Petition

81-1330

Office - Supreme Court, U.S.
FILED
JAN 15 1982
ALEXANDER L. STEVAS,
CLERK

In The
Supreme Court of the United States

October Term, 1981

No.

THE OHIO STATE BOARD OF EDUCATION AND SUPERINTENDENT OF PUBLIC INSTRUCTION,

Petitioners,

vs.

ROBERT ANTHONY REED, III, et al,

AND

GARY L. PENICK, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MARK PATRICK O'NEILL
2500 Terminal Tower
Cleveland, Ohio 44113
(216) 241-6602

Counsel for Petitioners

January 15, 1982

QUESTIONS PRESENTED

1. On what basis may a state board of education be deemed to have violated its duty under the Equal Protection Clause of the Fourteenth Amendment for failing to discover and eliminate intentionally segregative practices by a local board of education?

2. Should a state board of education be held in violation of the Equal Protection Clause for not discovering and correcting intentional segregative practices by a local board of education in the absence of any finding, conformable to *Keyes v. School Board No. 1*, 413 U.S. 189 (1973), that its failure was attributable to its own "intentionally segregative policy"?

3. Should a state board of education, which has been guided by contemporary case law in exercising its oversight responsibilities toward local school districts, be held in violation of the Equal Protection Clause for failing to correct practices of a local school district which are not unlawful at the time, if such practices are judicially determined at a later date to be unconstitutional?

TABLE OF CONTENTS

	Page
PRAYER	1
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISION INVOLVED	3
STATEMENT OF THE CASE	3
A. Procedural History	3
B. Historical Background	5
C. The Court of Appeals' Test for the Liability of the State Defendants	10
D. The District Courts' Findings	11
REASONS FOR GRANTING THE WRIT	14
1. THIS CASE PRESENTS IMPORTANT QUESTIONS CONCERNING THE CONSTITUTIONAL RESPONSIBILITY OF STATE BOARDS OF EDUCATION TO ELIMINATE THE INTENTIONALLY SEGREGATIVE PRACTICES OF LOCAL BOARDS OF EDUCATION	14
2. THE TEST FOR THE CONSTITUTIONAL RESPONSIBILITY OF THE OHIO STATE BOARD OF EDUCATION, AS APPLIED BY THE COURT OF APPEALS, CONFLICTS WITH DECISIONS OF THIS COURT WHICH REQUIRE A FINDING OF "INTENTIONALLY SEGREGATIVE POLICY" BY A BOARD OF EDUCATION BEFORE IT MAY BE DEEMED TO BE IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENMENT	16
CONCLUSION	19

TABLE OF CITATIONS

	Page
Arthur v. Nyquist, 573 F. 2d 134 (2nd Cir., 1978), *cert. denied*, 439 U.S. 860 (1978)	15
Board of Education v. State, 45 Ohio St. 555 (1888)	5
Board of Education of School District of City of Dayton v. State ex rel. Reese, 114 Ohio St. 188 (1926)	6
Bradley v. Milliken, 484 F. 2d 215 (6th Cir., 1973)	14
Brown v. Board of Education, 437 U.S. 483 (1954)	14
Buchanan v. Evans, 423 U.S. 963 (1975)	14
Clemons v. Board of Education of Hillsboro, 228 F. 2d 853 (6th Cir., 1956)	6
Columbus Board of Education v. Penick, 443 U.S. 449 (1979)	14, 17
Craggett v. Cleveland Board of Education, 234 F. Supp. 381 (N.D. Ohio, 1964), *aff'd*, 338 F. 2d 941 (6th Cir., 1964)	8
Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977), 443 U.S. 526 (1979)	10, 14
Deal v. Cincinnati Board of Education, 369 F. 2d 55 (6th Cir., 1966), *aff'd after remand*, 419 F. 2d 1387 (6th Cir., 1969), *cert. denied*, 402 U.S. 962 (1971)	8
Evans v. Buchanan, 393 F. Supp. 428 (D. Del., 1975)	14
Green v. County School Board, 391 U.S. 430 (1968)	14
Keyes v. School Board No. 1, 413 U.S. 189 (1973)	16
Liddell v. Board of Education, City of St. Louis, 491 F. Supp. 351 (E.D. Mo., 1980)	14
Morgan v. Kerrigan, 379 F. Supp. 410 (D. Mass., 1974), *aff'd*, 509 F. 2d 580 (1st Cir., 1975)	15

	Page
Penick v. Columbus Board of Education, 583 F. 2d 787 (6th Cir., 1978), 663 F. 2d 24 (6th Cir., 1981)	4, 15
Reed v. Rhodes, 500 F. Supp. 404 (N.D. Ohio, 1980), 607 F. 2d 714 (6th Cir., 1979), *cert. denied*, 445 U.S. 935 (1980), 662 F. 2d 1219 (6th Cir., 1981)	4
Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1971)	14
U.S. v. Board of School Commissioners of The City of Indianapolis, 637 F. 2d 1101 (7th Cir., 1980)	14
Washington v. Davis, 426 U.S. 229 (1976)	17

INDEX TO APPENDIX

Page

Penick v. Columbus Board of Education

Opinion and Order of the District Court (January 8, 1981) 1

Judgment Entry of the District Court (January 8, 1981) 37

Opinion of the Court of Appeals for the Sixth Circuit (October 21, 1981) 38

Judgment Entry of the Court of Appeals (October 21, 1981) 51

Reed v. Rhodes

Memorandum Opinion and Order of the District Court (September 23, 1980) 53

Judgment Entry of the District Court (September 24, 1980) 97

Opinion of the Court of Appeals for the Sixth Circuit (October 21, 1981) 98

Judgment Entry of the Court of Appeals (October 21, 1981) 123

Plaintiffs' Exhibit SL-46, Statement of Rufus Pierce to State Board of Education, April 13, 1970 125

Ibid., Statement of Edith Gaines to State Board of Education, April 13, 1970 126

In The
Supreme Court of the United States

October Term, 1981

No.

THE OHIO STATE BOARD OF EDUCATION AND SUPERINTENDENT OF PUBLIC INSTRUCTION,

Petitioners,

vs.

ROBERT ANTHONY REED, III, et al,

AND

GARY L. PENICK, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, The Ohio State Board of Education and Superintendent of Public Instruction, pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Sixth Circuit entered in these proceedings on October 21, 1981.

The adverse *Reed* respondents are the plaintiff class consisting of all black children attending public schools in the Cleveland, Ohio school district. The adverse *Penick* respondents are the plaintiff class consisting of all black children attending public schools in the Columbus, Ohio school district. Additional respondents are the Cleveland and Columbus Boards of Education and their superin-

tendents, the Ohio State Controlling Board, and the Auditor of State. The United States has been *amicus curiae* in the Cleveland case since it was invited by the District Court to enter that case in 1977.

OPINIONS BELOW

This petition seeks the review of two decisions of the United States Court of Appeals for the Sixth Circuit which involve closely related questions concerning the duties of the Ohio State Board of Education and Superintendent of Public Instruction under the Equal Protection Clause of the Fourteenth Amendment to correct *de jure* segregation in the Cleveland and Columbus school districts. The opinion in the Cleveland case is reported as *Reed v. Rhodes*, 662 F. 2d 1219 (6th Cir., 1981). It affirmed the decision of the District Court which is reported at 500 F. Supp. 404 (N.D. Ohio, 1980). The opinion of the Court of Appeals in the Columbus case is reported as *Penick v. Columbus Board of Education*, 663 F. 2d 24 (6th Cir., 1981). It affirmed an unreported decision of the District Court for the Southern District of Ohio.

JURISDICTION

The judgments of the Court of Appeals were entered in both the Cleveland and Columbus cases on October 21, 1981, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. On what basis may a state board of education be deemed to have violated its duty under the Equal Protection Clause of the Fourteenth Amendment for failing

to discover and eliminate intentionally segregative practices by a local board of education?

2. Should a state board of education be held in violation of the Equal Protection Clause for not discovering and correcting intentional segregative practices by a local board of education in the absence of any finding, conformable to *Keyes v. School Board No. 1*, 413 U.S. 189 (1973), that its failure was attributable to its own "intentionally segregative policy"?

3. Should a state board of education, which has been guided by contemporary case law in exercising its oversight responsibilities toward local school districts, be held in violation of the Equal Protection Clause for failing to correct practices of a local school district which are not unlawful at the time, if such practices are judicially determined at a later date to be unconstitutional?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, Section 1:

> . . . [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Procedural History

The plaintiff classes instituted these actions in the district courts to redress the claimed deprivation of rights guaranteed under the Fourteenth Amendment to the Constitution of the United States. Jurisdiction was invoked under 28 U.S.C. Sections 1331(a), 1343(3) and (4), and 42 U.S.C. Sections 1981, 1983-1988 and 2000(d). The defendants were the Cleveland and Columbus Boards of Education, their superintendents, the State Board of Education and Superintendent of Public Instruction, the Gov-

ernor, and the Attorney General. After lengthy trials the district courts dismissed the Governor and Attorney General but found that the city school administrations had been guilty of acts and omissions which were intended to maintain racial segregation in the schools. The district courts found that the State Board of Education and Superintendent of Public Instruction (referred to hereafter as the state defendants) failed to detect or correct the local defendants' acts of *de jure* segregation and were therefore in violation of their Fourteenth Amendment duties.

On appeal, the district courts' findings with respect to the local school boards were affirmed,[1] but the cases were remanded to the district courts for further consideration of the state defendants' liability.[2] Further hearings were conducted on that issue, resulting in additional findings by the district courts and judgments against the state defendants which were affirmed by the Court of Appeals for the Sixth Circuit on October 21, 1981. Those judgments are the ones which petitioners pray that this Court review.

In Cleveland, the District Court found that "the State defendants either (1) had knowledge of the existence of substantial intentional segregative practices by the Cleveland defendants, or (2) were confronted with information of such magnitude that such knowledge could be imputed to them; and that their failure to investigate and to correct the violations was intentionally supportive of such practices." (App. 76). The Court of Appeals held that the District Court's findings were not clearly erroneous. It

---

[1] *Reed v. Rhodes*, 607 F. 2d 714 (6th Cir., 1979), *cert. denied*, 445 U.S. 935 (1980); *Penick v. Columbus Board of Education*, 583 F. 2d 787 (6th Cir., 1978), *affirmed, Columbus Board of Education v. Penick*, 443 U.S. 449 (1979).

---

[2] *Reed v. Rhodes*, 607 F. 2d 714, 718 (6th Cir., 1979); *Penick v. Columbus Board of Education*, 583 F. 2d 787, 818 (6th Cir., 1978).

found that "the State Board had direct knowledge of the Cleveland Board's intentional school segregative practices" and that "the motivation (and the effect) of the State Board on this total record must be held to be the perpetuation of racial segregation." (App. 113, 114).

In Columbus, the District Court found that the knowledge which the state defendants had of practices in that school district "other than that relating to faculty assignments, does not rise to the level of actual knowledge of intentional segregative practices." (App. 31). However, it concluded that the knowledge which the state defendants did have would have caused a reasonable person, charged with the same legal duties as the state defendants, "to initiate an investigation into the causes of segregation in the Columbus public schools." (App. 31-32). The failure of the state defendants to do this in Columbus was found by the District Court to be "another manifestation of the enduring policy of the State Board to let some other governmental agency handle this emotionally-charged issue." (App. 32). The Court of Appeals held that the District Court's findings were not clearly erroneous. It found that "the State Board had direct knowledge of the Columbus Board's intentional school segregative practices" and that its failure to investigate further and to correct the racial imbalance which it knew of was motivated by intent to perpetuate segregation. (App. 50).

B. Historical Background

In 1887 the Ohio General Assembly repealed the statute under which boards of education had been authorized to maintain separate schools for black children. In 1888 the Ohio Supreme Court held that by virtue of this action "separate schools for colored children have been abolished" and that school boards no longer had any authority to make assignments "with reference to the race or color of the youth." *Board of Education v. State*, 45

Ohio St. 555, 556 (1888). Occasional efforts thereafter by some local boards to maintain segregated schools were struck down as contrary to the public policy of the state. *Board of Education of School District of City of Dayton v. State ex rel. Reese,* 114 Ohio St. 188 (1926); *Clemons v. Board of Education of Hillsboro,* 228 F. 2d 853 (6th Cir., 1956) (citing state and federal laws).

In 1954 the Ohio Constitution was amended to provide for an elected State Board of Education. The first State Board took office in January 1956 and promptly addressed the question of its authority to investigate for racially segregated schools, the existence of which had been suggested by one of the Board's members. The Board referred the question of its authority to the Attorney General for an opinion. In July 1956 the Attorney General advised the Board that it had the responsibility in the first instance to determine whether school districts were in conformance with law; that a district which maintained segregated schools would not be in conformance with state or federal law and would not be entitled to state funding; and that the Board had authority to conduct hearings and compel the attendance of witnesses to determine whether as a matter of fact segregated schools existed. (The full text of the opinion appears at App. 115-122). Thereafter the State Board determined to act on any notice of segregation which might be brought to it but not to initiate investigations in the absence of notice.

The first notice of claimed segregation which the Board received was in 1963 when representatives of the Cincinnati branch of NAACP asserted that the Cincinnati school district was intentionally segregating black children in an elementary school. The State Board requested a response from the Cincinnati school district. After considering all the reported facts the Board was unable to conclude that Cincinnati's procedures were unlawful, and it invited the complainants to seek a judicial determination.

They did so, and in 1965 those procedures were found by the U.S. District Court for the Southern District of Ohio to be permissible exercises of administrative discretion. (*Reed*, Rehearing Transcript, 779-780).

In 1964 the State Board received a complaint from Hamilton County representatives of the NAACP that all the black children of elementary age in the North College Hill local school district were being gerrymandered into one elementary school. The State Board ordered an investigation. It found the local board's practice to be intolerable. The school was closed and the pupils were reassigned, to the satisfaction of the complainants (*Penick*, T. 5839-40, 6021; Rehearing T. 116-117, 122-123). The State Board thus demonstrated its willingness to investigate claims of *de jure* segregation and to eliminate *de jure* practices. This policy was subsequently implemented by the Department of Education without need for State Board action when evidence of *de jure* practices was brought to the attention of the Superintendent of Public Instruction. On his order segregative practices in Middletown and Toledo were eliminated (*Penick*, T. 6037-39, 6144-45; *Reed*, T. 3955-57), and in 1973 the Dayton school district was ordered to correct its segregative practices when the Department of Education learned of them (*Reed*, PX 381).

The difference between *de jure* and *de facto* segregation was a troubling matter on which state education officials took their direction from federal courts. In the 1960's the Cleveland and Cincinnati school districts were involved in litigation to test whether their policies and the racial balances which existed in those cities were unconstitutional. In Cleveland the local school board's program of school construction, which involved the development of new elementary schools in neighborhoods which were predominantly of one race and which would produce school populations which would be foreseeably of one race, was held by the U.S. District Court for the Northern

District of Ohio to be constitutionally permissible, and the Cleveland school district was found by that Court to be free of segregative intent. *Craggett v. Cleveland Board of Education*, 234 F. Supp. 381 (N.D. Ohio, 1964), *aff'd*, 338 F. 2d 941 (6th Cir., 1964). The effect of this decision on the State Board was to induce the belief that although there were substantial racial concentrations in the schools of Cleveland those conditions were not the product of unconstitutional action by local school officials. (*Reed*, T. 3582-83, 3960-62; Rehearing Transcript, 152-153, 172-178, 285-287, 500, 600-602).[3]

Comparable litigation occurred in Cincinnati in the mid-1960's. The District Court for the Southern District of Ohio found that the administration of the Cincinnati school district was not marked by segregative intent. As in Cleveland, the Court approved the neighborhood school assignment policy and held that notwithstanding racial imbalances the school board was not constitutionally required to reassign or transport pupils to achieve a more even distribution. (*Penick*, T. 5868-70; *Reed*, T. 3960-62). The District Court's decisions were affirmed by the Sixth Circuit twice. *Deal v. Cincinnati Board of Education*, 369 F. 2d 55 (6th Cir., 1966), *aff'd after remand*, 419 F. 2d 1387 (6th Cir., 1969), *cert. denied*, 402 U.S. 962 (1971).

Because of the *Craggett* and *Deal* decisions, which exonerated the Cleveland and Cincinnati school districts of charges of unconstitutional discrimination, upheld the neighborhood school policies of those boards of education, and tolerated a substantial degree of racial concentration, the State Board of Education was led to believe that racial imbalances in urban school systems were not unlawful so long as they were not the product of gerrymandering and

---

[3] The U.S. Civil Rights Commission investigated the Cleveland school system in 1966. Its report, published in 1967, made no assertion that *de jure* segregation existed there.

that neighborhood schools were constitutionally viable. (*Penick*, Rehearing Transcript, 160-164; *Reed*, Rehearing Transcript, 152-153, 172-178, 285-287, 500, 600-602).

In 1968 the State Board of Education adopted a policy statement on equal educational opportunity. Racial imbalance in schools due to residential housing patterns and the assignment of children to neighborhood schools was regarded as falling within the purview of local boards and was not considered subject to corrective mandate by the State Board.[4] However, the State Board considered *de facto* segregation undesirable. It called for "specific effort on the part of all school districts to find ways to move toward the solution of the problems of *de facto* segregation." The State Board committed itself to assist districts to achieve integrated education. An Assistant Superintendent for Urban Education was appointed to head the Department of Education's Office of Equal Educational Opportunity. This agency thereafter provided a variety of desegregation services which resulted in the elimination of *de facto* concentrations in a number of school districts (*Reed*, T. 3813, 3828, 3835; *Penick*, T. 5943-46).

At no time did the State defendants believe that unconstitutional segregation existed in Cleveland or Columbus. Cleveland had been vindicated in the *Craggett* case

---

[4] In Ohio, local school boards are substantially autonomous. They may exercise their own discretion about most operational matters free from state control. State officials do not approve the siting or construction of new school buildings. They do not determine the attendance area which a school serves. The assignment of children and staff is the prerogative of the district superintendent. (*Reed*, T. 4003). So long as local administrators lawfully exercise their discretion concerning school siting, teacher and pupil assignments, boundary lines, grade structure, transportation arrangements, etc., the State Board of Education has no authority to require them to make different provisions. Only when local administrators act unlawfully may state officials mandate corrective action.

in 1964, and the charge of *de jure* segregation against Cincinnati had been twice refuted in *Deal*. There was nothing about Columbus which seemed significantly different. The Urban League's 1967 analysis of the Columbus schools concluded that the only segregation there was *de facto* (*Penick*, Rehearing Transcript, 155-157, DX 7, p. 38).

The state defendants had no knowledge of the obscure decisions of the Cleveland and Columbus school districts which were later found in these cases to have been intentionally segregative. (*Penick*, Rehearing Transcript, 74-75, 128; *Reed*, Rehearing Transcript, 245-248, 482-489, 584-588, 594-597, 600-604, 613, 801-802). Prior to the filing of these cases in 1973 no complaints of illegal segregation in Cleveland or Columbus were made to the State Board by the NAACP, any federal agency, or any other person or organization. (*Penick*, T. 5958-59, 6035; Rehearing Transcript, 74-75; *Reed*, Rehearing Transcript, 500-501, 626-627).[5]

C. The Court of Appeals' Test for the Liability of the State Defendants

The Court of Appeals held that *Dayton Board of Education v. Brinkman* 433 U.S. 406 (1977), precludes

[5] In *Reed* the District Court considered that oral presentations by two parents to a State Board meeting on April 13, 1970 constituted notice of segregation in Cleveland. The full text of their statements is included in the Appendix, pp. 125-128. As they disclose, neither parent claimed any segregation in Cleveland. The District Court also considered that a letter written to the U.S. Department of Health, Education and Welfare by a Cleveland parent in 1970 requesting the withholding of federal funds from Cleveland put the state defendants on notice of illegal segregation in Cleveland. HEW's report of its investigation disclosed only some inequality of educational services between Glenville and Collinwood High Schools, overcrowding at Glenville and underutilization of Collinwood. No segregation was found or reported by HEW (*Reed*, Rehearing PX 62).

a finding of constitutional violation by a state board predicated merely on its failure to compel local boards to comply with the United States Constitution. Rather, "knowledge by the state of intentional segregative practices on the part of the local board and intentional support of the local board in pursuing such practices appear to be requirements for a finding of constitutional violation." *Reed v. Rhodes*, 607 F. 2d at 718. (App. 99).

Petitioners concede the nominal validity of this test provided its application also satisfies the bedrock *Keyes* principle that a school board's violation of the Equal Protection Clause must be established by proof of its "intentionally segregative policy." *Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973). The Court of Appeals' test is erroneous in its application to these petitioners because its judgment is not based on a finding that petitioners actually had an "intentionally segregative policy." It rests principally on the Court's opinion that petitioners should have been more vigorous in the assertion of their authority to investigate and should have uncovered the segregative intent which tainted operational decisions of the Cleveland and Columbus boards.

D. The District Courts' Findings

Columbus

The essential basis for the District Court's judgment in the Columbus case was that the State Board should have suspected illegal segregation, did not investigate the reasons for Columbus' racial imbalance, and did not make the same determination of *de jure* segregation which the District Court itself made after a lengthy trial. The District Court considered this to be "intentional condonation of the unlawful status quo." (App. 33). It did not attribute the lack of inquiry to an intentionally segregative policy of the State Board. Rather, it found that the State Board's

outlook was one of "studied indifference." (*Id.*, 6). Its approach was "hands off, let someone else do it." (*Id.*, 30). Its policy was "to let some other governmental agency handle this emotionally-charged issue." (*Id.*, 32). It would do its duty to investigate for *de jure* practices only if "someone informed it that its duty needed to be done." (*Id.*, 31). The Court acknowledged that "it cannot be said that the state defendants looked the other way while constitutional rights were being thwarted; it can be said, however, that they closed their eyes knowing that the law required them open." (*Id.*, 34). The Court found that except for the assignment of teachers the State Board's knowledge of Columbus' operations did "not rise to the level of actual knowledge of intentional segregative practices."[6] (*Id.*, 31).

Cleveland

In the Cleveland case the District Court described eight events which suggested to it that the State Board either knew or should have known of Cleveland's segregative practices: (1) the existence of special schools for black children in 1930; (2) the state's approval of Cleveland's request to resort to half-day sessions in overcrowded schools in 1958 and 1959; (3) the submission of a study in 1967 by a local university professor to the U.S. Civil Rights Commission reporting some intentionally segregative practices in the Cleveland school district; (4) the State Department of Education's receipt of a letter in 1970

[6] Disproportionate assignments of black teachers to predominantly black schools were brought to the attention of the Department of Education, which did not condone these assignments but identified them as something which needed correction. Columbus accepted the Department's proposal to work with it on staff reassignment (*Penick*, T. 5952-5953). By the time of trial in 1976 Columbus' teaching staff had been reassigned on a racially neutral basis under a 1974 consent decree approved by the Ohio Civil Rights Commission.

from a Cleveland parent to the U.S. Department of HEW claiming that segregation was practiced in Cleveland; (5) oral addresses to the State Board of Education in 1970 by two parents; (6) the Department of Education's survey in 1968 of the racial composition of each of Cleveland's schools; (7) the denial by HEW in 1975 of Cleveland's application for ESAA funding; and (8) the State Board's general awareness of the extent of racial isolation in the Cleveland schools. See App. 76-84 for the District Court's discussion.[7]

Although the District Court condemned the State Board's failure to press an investigation into the causes of racially imbalanced schools in Cleveland, it did not find that the State Board's failure to do this was attributable to an intentionally segregative policy. The Court found that "the failure of the state defendants to investigate *de facto* segregation ultimately appears to have been motivated by a desire to maintain the status quo." 500 F. Supp. at 423. (App. 89). Given the decision in *Craggett v. Cleveland Board of Education*, the State Board believed that the status quo was not unlawful and that it therefore lacked authority to order Cleveland to eliminate *de facto* segregation.

---

[7] Succinctly stated, Petitioners' response was: (1) that there was no evidence that the special schools in 1930 were intentionally segregated; (2) the state did not know of any segregative practice in connection with the halfday sessions in 1958-59, nor did it know of the racial composition of the schools which were involved; (3) the state first learned of the professor's report in 1976, during the trial; (4) HEW's investigation of the complaint disclosed no segregation in the Cleveland school system; (5) the parents did not report any segregative practice to the State Board during their remarks; (6) racially imbalanced schools were not considered unlawful in view of the *Craggett* decision, which exonerated Cleveland of the charge of unconstitutional segregation; (7) HEW's denial of funding was not based on any claim by it that Cleveland was unlawfully segregated; and (8) *de facto* segregation in Cleveland was common knowledge.

WHY THE WRIT SHOULD BE GRANTED

1. THIS CASE PRESENTS IMPORTANT QUESTIONS CONCERNING THE CONSTITUTIONAL RESPONSIBILITY OF STATE BOARDS OF EDUCATION TO ELIMINATE THE INTENTIONALLY SEGREGATIVE PRACTICES OF LOCAL BOARDS OF EDUCATION.

Although the responsibility of local boards of education to abstain from racially segregative practices and to eliminate the effects of past discrimination has been fully explained by this Court,[8] it has not defined the responsibility of state boards of education to eliminate segregated schools at the local district level.

In cases where local segregation is the result of intentionally segregative acts by a state legislature, courts have found equal protection violations by the states. *U.S. v. Board of School Commissioners of The City of Indianapolis,* 637 F. 2d 1101, 1105-1108 (7th Cir., 1980); *Evans v. Buchanan,* 393 F. Supp. 428, 442-443 (D. Del., 1975), *aff'd sub nom. Buchanan v. Evans,* 423 U.S. 963 (1975); *Bradley v. Milliken,* 484 F. 2d 215, 238 (6th Cir., 1973). In states where segregated schools were mandated by statute or constitution in 1954, state boards of education have been under a continuing duty to eliminate the continuing effects of past *de jure* practices, and their failure to take effective action has been deemed unconstitutional. *Liddell v. Board of Education, City of St. Louis,* 491 F. Supp. 351 (E.D. Mo., 1980). Where a state board of education has been involved in the siting and construction of new schools

---

[8] *Brown v. Board of Education,* 437 U.S. 483 (1954); *Green v. County School Board,* 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971); *Keyes v. School District No. 1,* 413 U.S. 189 (1973); *Dayton Board of Education v. Brinkman,* 433 U.S. 406 (1977) and 443 U.S. 526 (1979); and *Columbus Board of Education v. Penick,* 443 U.S. 449 (1979).

and has thereby played an active role in the creation of segregated conditions, it has been found guilty of an equal protection violation. *Bradley v. Milliken, supra,* at 242.

In Ohio, segregated schools have been illegal since 1887, and no affirmative act by the state legislature or the State Board of Education caused the Cleveland or Columbus schools to be segregated.[9] In these cases petitioners have been found guilty of an equal protection violation because of their failure to discover and correct the segregative practices of the Cleveland and Columbus school districts.

On similar facts the Second Circuit reversed a finding that the New York Board of Regents was guilty of an equal protection violation because of its failure to eliminate segregation in the Buffalo schools. *Arthur v. Nyquist,* 573 F. 2d 134 (2nd Cir., 1978), *cert. denied,* 439 U.S. 860 (1978). The claim there was the same as the one here: that the Regents "failed to combat segregation as aggressively as they might have." *Id.,* 146. The Second Circuit rejected this failure as a basis of liability, finding no link between illicit segregation in Buffalo and any "intentional policy adopted by the state appellants which indicates specific approval" of the local district's segregative actions. *Accord, Morgan v. Kerrigan,* 379 F. Supp. 410, 476-477 (D. Mass., 1974), *aff'd,* 509 F. 2d 580 (1st Cir., 1975) (state board of education found not guilty of equal protection violation for failing to rectify segregative practices of Boston School Committee).

Although there is no direct conflict between the decisions of the Second and Sixth Circuits in these cases, the disparate results are due to the Sixth Circuit's disposition to find an equal protection violation by a state school

---

[9] "This record does not show any act on the part of the State Board which *required* the Columbus Board to pursue the segregative policies which the District Judge and this Court have found." *Penick v. Columbus Board of Education,* 583 F. 2d 787, 818 (6th Cir., 1978) (emphasis in the original).

board in the absence of evidence that the board had an intentionally segregative policy.

The basis on which a state board of education should be deemed constitutionally liable for failing to correct segregation in a local school district is an important, recurring and unresolved issue which this Court should decide.

2. THE TEST FOR THE CONSTITUTIONAL RESPONSIBILITY OF THE OHIO STATE BOARD OF EDUCATION, AS APPLIED BY THE COURT OF APPEALS, CONFLICTS WITH DECISIONS OF THIS COURT WHICH REQUIRE A FINDING OF "INTENTIONALLY SEGREGATIVE POLICY" BY A BOARD OF EDUCATION BEFORE IT MAY BE DEEMED TO BE IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Sixth Circuit's test for an equal protection violation by a state board of education is facially harmonious with Supreme Court decisions which emphasize the element of segregative intent as the basis on which an equal protection violation must be predicated.[10] As applied to these petitioners, however, the Court of Appeals' test is incomplete, inequitable and inconsistent with *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

Keyes held that "the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred to in *Swann* is *purpose* or *intent* to segregate." 413 U.S. at 208. Under *Keyes*, "intentionally segregative policy" and "purpose or intent to segregate"

---

[10] The Court of Appeals stated: "As we have indicated . . . knowledge by the state of intentional segregative practices on the part of the local board and intentional support of the local board in pursuing such practices appear to be requirements for a finding of constitutional violation." (App. 99).

are indispensible predicates for a finding that a school board has violated the Equal Protection Clause. *Accord, Washington v. Davis,* 426 U.S. 229, 240 (1976). In *Columbus Board of Education v. Penick,* 443 U.S. 449, 464 (1979) this Court approved statements that plaintiffs in a school desegregation case must not only "prove that segregated schooling exists but also that it was brought about or maintained by intentional state action," and that school officials "intended to segregate." There is no reason why this rule for local school officials should not also apply to a state board of education. Before the latter may be considered to have violated its obligations under the Equal Protection Clause, it should be established that illegal segregation in a local district is the product of the state board's "intentionally segregative policy."

In the present cases petitioners were not found by the District Courts to have had a purpose or intent to segregate children in the Cleveland or Columbus schools. The record is clear that the State Board and the Department of Education eliminated *de jure* practices when such practices were brought to their attention. Their basic policy was to encourage local school districts to eliminate *de facto* concentrations, and they carried out that policy in many supportive ways.[11] In concluding that petitioners violated their equal protection duties, the Court of Appeals disregarded the substantial record of desegregative action

---

[11] On-site desegregative assistance had been provided to 118 school districts as of January, 1976, when the *Reed* case was tried. It consisted of demographic studies, counselling, and recommendations for boundary line adjustments, pairing, changes in attendance zones, alteration of grade levels, and other changes (*Reed,* T. 3813-3828, 3835). Publications on desegregative measures were prepared and distributed (*id.,* 3801-3805), districts were assisted in recruiting minority teachers (*id.,* 3811), integrative consolidations of school districts were promoted and achieved (*id.,* 3927-3934,) and racially motivated transfers of school district territories were prohibited by the State Board (*id.,* 3923-3927).

by petitioners, ignored the evolving case law as to what was not, and later was, unconstitutional, and ascribed to the petitioners arguments they did not make and rationales which never served as a basis for their policy.[12]

Petitioners are considered to be in violation of the Equal Protection Clause not because they had an intentionally segregative policy or independent segregative intent, but because they are deemed to have had knowledge of a few circumstances which, years after the events, were held to be segregative in a *de jure* sense, although at the time in question no responsible agency or knowledgeable observers characterized those circumstances as unlawful.[13]

---

[12] The Court of Appeals stated that petitioners "assert that they had no duty to inform themselves and provide a remedy, until and unless there was court adjudication of the illegality of the questionable segregative practice or incident" and that petitioners argued "that absent a legal finding by a court, they had no duty to take action to end segregation in Ohio schools." (*Reed*, App. 109, 111). No such assertions were made by petitioners. The record demonstrates that petitioners eliminated intentionally segregative practices in the North College Hill, Toledo and Middletown districts without any court adjudication. The Court of Appeals' statement "that in the history of Ohio, defendants never fulfilled [their] duty . . . to desegregate any schools which had been intentionally segregated" (App. 113) is unwarranted.

The Court also stated, erroneously, that "the principal defense that the state defendants advance for their failure to act to desegregate the Columbus schools after 1954 is that they had not been put on notice by any court decree that the racial isolation in the Columbus schools was illegal." (*Penick*, App. 46). Petitioners' actual defense was that they did not have knowledge of any practices by the Cleveland or Columbus school districts which were regarded as unconstitutional at the time.

[13] As noted *supra*, the U.S. District Court in Cleveland had itself addressed alleged *de jure* practices of the Cleveland school district in 1964 and had pronounced them constitutionally acceptable. *Craggett v. Cleveland Board of Education, supra.* The same practices (constructing schools in racially isolated neighborhoods and assigning children to neighborhood schools) were deemed by the same District Court in 1976 to be acts of *de jure* segregation.

The Court of Appeals' test focuses on the State Board's actual or constructive knowledge of local actions which have been found unconstitutional. It fails to square with the fundamental principle that a school board must appear to have been motivated by an "intentionally segregative policy" before it may be deemed to be in violation of the Equal Protection Clause.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgments and opinions of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

MARK PATRICK O'NEILL
WESTON HURD FALLON PAISLEY & HOWLEY
2500 Terminal Tower
Cleveland, Ohio 44113
(216) 241-6602

Counsel for Petitioners

Of Counsel:

THOMAS P. MICHAEL
ALEXANDER EBINGER FISCHER LAWRENCE
& MCALISTER
1120 Huntington Bank Building
17 S. High Street
Columbus, Ohio 43215
(614) 221-6345

January 15, 1982

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GARY L. PENICK, et al.,
Plaintiffs

v.

COLUMBUS BOARD OF EDUCATION, et al.,
Defendants

Case No. C-2-73-248

OPINION AND ORDER

Introduction

In an earlier opinion in this case, this Court concluded that the Ohio State Board of Education and the Ohio Superintendent of Public Instruction – the State defendants – in addition to the Columbus defendants violated the constitutional rights of certain Columbus school children. *Penick* v. *Columbus Board of Education*, 429 F. Supp. 229 (S.D. Ohio 1977). That conclusion was grounded, for the most part, on the belief that the State defendants failed to act when action was required. I wrote:

> The failure of these State defendants to act, with full knowledge of the results of such failure, provides a factual basis for the inference that they intended to accept the Columbus defendants' acts, and thus shared their intent to segregate in violation of a constitutional duty to do otherwise.

Upon appellate review, the United States Court of Appeals for the Sixth Circuit, although regarding my conclusion "as a general finding of intentional support of segregation by the State Board," returned the case to this Court, ruling that the question of the liability of the State defendants should be further considered. *Penick* v. *Columbus Board of Education*, 583 F.2d 787, 818 (6th Cir. 1978).

The United States Supreme Court, in reviewing this case, concisely summarized this Court's findings and conclusions against the Columbus defendants, as follows:

> Third, the District Court not only found that the[Columbus School] Board had breached its constitutional duty by failing effectively to eliminate the continuing consequences of its intentional systemwide segregation in 1954, but also found that in the intervening years there had been a series of Board actions and practices that could not "reasonably be explained without reference to racial concerns," *id.*, at 241, and that "intentionally aggravated, rather than alleviated," racial separation in the schools. App. to Pet. for Cert. 94. These matters included the general practice of assigning black teachers only to those schools with substantial black student populations, a practice that was terminated only in 1974 as the result of a conciliation agreement with the Ohio Civil Rights Commission; the intentionally segregative use of optional attendance zones, discontiguous attendance areas, and boundary changes; and the selection of sites for new school construction that had the foreseeable and anticipated effect of maintaining the racial separation of the schools. The court generally noted that "[s]ince the 1954 *Brown* decision, the Columbus defendants or their predecessors were adequately put on notice of the fact that action was required to correct and to prevent the increase in" segregation, yet failed to heed their duty to alleviate racial separation in the schools. 429 F. Supp., at 255.

Columbus Board of Education v. *Penick*, 443 U.S. 449, 461-63 (1979) (footnotes omitted).

The question for this Court to decide on remand is whether the State defendants have intentionally acted or failed to act thereby causing systemwide school segregation in the Columbus School District. This question requires inquiry into the relationship, if any, of the State defendants to the discriminatory practices of the Colum-

bus defendants, noted above, such as the general assignment of black teachers only to those schools with substantial black student populations; the intentionally segregative use of optional attendance zones, discontiguous attendance areas and boundary changes; the selection of sites for new school construction that had the foreseeable and anticipated effect of maintaining racial separation; the failure to heed the duty to alleviate continuing consequences of intentional systemwide segregation in the schools after adequate notice that action was required; and other intentional acts or omissions. Part of the Court's task on remand, therefore, is to review the facts and arrive at conclusions concerning the involvement, if any, of the State defendants in these acts or omissions. In determining this question, it is critical to determine just how much involvement by the State is needed to establish liability. In this connection, the Court of Appeals set forth certain guidelines to help in this determination. The Court of Appeals stated:

> While we believe that what we have quoted from the District Judge's opinion must be regarded as a general finding of intentional support of segregation by the State Board, it may well be argued that the *Dayton* opinion requires more detailed findings of fact pertaining to (1) the State Board's knowledge (if any) of the Columbus Board's intentional segregative practices, (2) the State Board's failure to protest or restrain them by withholding funds, (3) the State Board's continuance of support in the face of such knowledge, (4) the motivation of the State Board in failing to investigate the reasons for de facto segregation, and (5) the effect of findings, if any, under (1), (2), (3) and (4) above as suggested in *Dayton, supra,* [433 U.S.] at 420 . . . .

Penick v. *Columbus Board of Education*, 583 F.2d 787, 818 (6th Cir. 1978).

The Court of Appeals suggested the taking of additional testimony concerning the factual issues. This has been done.

Plaintiffs cite *Ex parte Virginia*, 100 U.S. 339 (1880) and *Cooper* v. *Aaron*, 358 U.S. 1 (1958) in support of their contention that the State of Ohio, although not a party to this action, is nevertheless liable for the acts of its political subdivisions. Thus, they say, the State of Ohio is before the Court in the person of parties who have the power to provide a remedy, and whose predecessors have caused the wrong.

Certainly, insofar as the contention speaks to the necessity of having the state or other of its divisions as parties before the Court for the purpose of assuring that the constitutional violations found against the Columbus defendants are remedied, the Court sees merit in the position. To date, however, the Court has not found it necessary to add parties for that purpose. To the extent that the argument calls for a conclusion of constitutional violations on the part of the State of Ohio or any of the State defendants without a finding that they or either of them have acted or failed to act with intent to cause or maintain unlawful segregation in the Columbus schools, it must be rejected. To hold otherwise would be contrary to the direction the Court of Appeals has suggested this Court follow on remand.

There is no basis for a theory of derivative or indirect liability. See *Rizzo* v. *Goode*, 423 U.S. 362 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229 (1976); *United States* v. *Board of School Commissioners of City of Indianapolis*, 573 F.2d 400 (7th Cir. 1978). As the Supreme Court stated in *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 694, n.58, "[b]y our decision in *Rizzo* v. *Goode*, 423 U.S. 362 (1976) we would appear to have decided that

the mere right to control without any control or direction to supervise is not enough to support § 1983 liability."

If, on the other hand, a superior fails to perform an explicit statutory duty and constitutional injury occurs, liability may attach. In *Johnson* v. *Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978), Judge Hufstedler stated as follows:

> Section 1983 provides, in pertinent part, that "[e]very person who, under color of any statute of any state . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . ." (42 U.S.C. § 1983). A person "subjects" another to the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made. (*Sims* v. *Adams* (5th Cir. 1976) 537 F.2d 829.) Moreover, personal participation is not the only predicate for section 1983 liability. Anyone who "causes" any citizen to be subjected to a constitutional deprivation is also liable.

The State defendants can be held liable if, through custom or practice, unlawful acts of subordinates are intentionally condoned by inaction when a foreseeable consequence of such inaction is an intrusion on constitutional rights and the inaction is a proximate cause of the injustice. As noted in an earlier opinion in this case, there is no requirement that the defendants be shown to have acted with racial animus.

In remanding the case for further proceedings, the Court of Appeals remarked:

> The record does not show an act on the part of the State Board which *required* the Columbus Board to pursue the segregative policies which the District

> Judge and this Court have found. It also does not show any action that the State Board took affirmatively to desegregate the Columbus schools or even to use its statutory powers to investigate and make findings as to whether the Columbus schools were being operated within the law.

Penick v. *Columbus Board of Education, supra,* 583 F.2d at 818.

This description of the state of the record remains correct even after the taking of additional evidence on remand. There is no evidence that the State Board required the violations. On the other hand there certainly is no evidence that the State Board took affirmative action to remedy the segregation or used its statutory powers to investigate. What the record indicates is a "studied indifference" entertained by State Board officials which can be reasonably said to have had the foreseeable effect of perpetuating unlawful practices in Columbus schools. The Court believes there is sufficient evidence as outlined below to establish liability in the State defendants for the constitutional deprivation imposed upon the plaintiffs in this case. The Court's findings in this regard are set forth below.

Historical Background

In *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977), the Supreme Court enumerated evidentiary sources a court can look to in determining the motivation for official action or inaction. Among these are the disproportionate impact of official action and the historical background including sequential events leading to a particular decision, any departures from normal policy and practice, and legislative or administrative history through statements of members of the decision-making body, minutes of its meetings or reports. *Id.*, at 266-68.

Accordingly, the Court's factfinding begins with historical facts concerning race and public education in Ohio, the State Board, the State Superintendent, and their predecessors in some detail.

Ohio became a state in 1803. The 1851 Ohio Constitution specifically denied the right to vote to blacks. Prior to 1848 black children in Ohio were denied the opportunity for public education. By an act of February 24, 1848 (2 Curwen Rev. Stat. 1428), Ohio for the first time provided for the education of "colored" children, and directed a tax levy for that purpose upon the property of "colored" persons. This law was replaced by another identical in substance by an act of February 10, 1849, (2 Curwen Rev. Stat. 1465). That law was then "liberalized" by an act of March 14, 1853, which permitted funding for the education of black children to derive from the common school fund, but still provided for separate schools for "colored" children. *Van Camp* v. *Board of Education of Logan*, 9 Ohio St. 406 (1859).

The Supreme Court of Ohio in 1871 commented on the issue of *separate* schools as follows:

> It would seem, then, that under the constitution and laws of this State, the right to classify the youth of the state for school purposes, on the basis of color, and to assign them to separate schools for education, both upon well recognized legal principles and the repeated adjudications of this court, is too firmly established to be now judicially disturbed.

State, ex rel. Garnes v. *McCann*, 21 Ohio St. 198, 208 (1871).

By 1887 the statute empowering local boards of education to maintain separate schools was repealed, Act of February 22, 1887 (84 Ohio L. 34) and the Supreme Court of Ohio ruled in *Board of Education* v. *State*, 45 Ohio St. 555 (1888), that "separate schools for colored children have been abolished."

The Department of Education came into existence in 1837. In 1838 the General Assembly created the office "Superintendent of Common Schools." However, this office was abolished in 1840 and the duties of the office were lodged with the Secretary of State. In 1853 the office of "State Commissioner of Common Schools" was created.

The current State Board of Education did not come into existence until after a 1953 amendment of the Ohio Constitution permitted the General Assembly to enact enabling legislation. Ohio Const., Art. VI, § 4; Title 33, Ohio Revised Code. The State Board had its first meeting in January 1956. The current State Board and the Superintendent of Public Instruction may fairly be identified as successors to the former State Department of Education and the series of officials in the Governor's cabinet who headed the department.

The Superintendent of Public Instruction is appointed by the Board and acts as its secretary and chief executive officer. He also heads the Department of Education, which is the administrative agency through which the Board's policies are implemented. The powers and responsibilities of the Superintendent are defined in R.C. 3301.09 through 3301.12.

This Court found earlier that, notwithstanding the abolition of statutory authority for separate schools for black children, the Columbus Board continued to establish new schools that were separate on the basis of race. For example, in 1909 the Columbus Board of Education created the Champion Avenue School as a separate school for blacks, staffed with black teachers. *Penick* v. *Board of Education, supra,* 429 F. Supp. at 235.

The predecessors of the current State defendants had ample knowledge of the maintenance and establishment of separate schools, in Columbus as well as elsewhere in the state, by virtue of reports required to be made by local school districts to the state department. According to a

number of records kept by the predecessors of the State defendants, substantial numbers of black students attended schools classified as racially separate schools during the 1920's, 1930's, 1940's and 1950's. (State Remand Exhibits 1-6.)

A 1929-31 report from the Ohio Director of Education to the Governor recited that over 64,000 colored children, more than 56,000 of them located in cities, were enrolled in the public schools of Ohio; 1,269 children in Columbus and 1,318 children in Cleveland were enrolled in "special schools for colored children" (State Remand Exhibits 1-6). Subsequent biennial reports are inconsistent as to the extent of segregation. The 1933-35 report recited that "Ohio generally does not have separate schools for colored children. A few cities maintain separate schools for colored pupils." The 1935-37 report states that: "A few cities have separate schools for colored children in certain sections where the population is entirely colored." The 1939-41 report does not reflect the number of colored children but states:

> Ohio has very few separate schools for colored children. Ten cities reported the existence of separate schools for colored children. These schools are located in centers where the population is mostly comprised of colored people. The following cities reported separate schools – Cincinnati, Chillicothe, Columbus, Dayton, Gallipolis, Lockland, Mansfield (classes only), Middletown, Portsmouth, Wilmington, and Xenia. Cincinnati and Columbus have a separate Junior High School for children in one locality, as well as elementary schools for colored children.

Similarly during the period 1940-1955, the State Department of Education required statistical reports from local school districts. Each district was asked to report the "Number of Separate Schools for Negroes" or, as in later reports, the "Number of Separate Schools for Colored

Children." The State Department of Education also required the submission of statistics concerning the number of colored teachers and pupils in each school. In 1940 Columbus reported the operation of four separate elementary schools and one separate junior high for colored children. In each year from 1944-1950 Columbus reported five elementary schools and one junior high; in 1952-1954, four separate elementary schools and one junior high were reported.

There is no doubt that during the reporting years mentioned above until 1954, the State defendants' predecessors were aware that there were a number of "separate schools" for black children in Ohio and in Columbus.

In that year, the United States Supreme Court issued its decision in *Brown* v. *Board of Education* (*"Brown I"*), 347 U.S. 483 (1954), declaring unconstitutional the maintenance of separate schools for black and white children. The State Department of Education eliminated questions pertaining to race from these statistical reports. No such questions appear on reports until 1968.

The Powers and Duties of the State Board

The powers and duties of the State Board and Superintendent are set forth in Chapter 3301 of the Revised Code of Ohio and are extensive. The State Board is empowered by R.C. 3301.07 to exercise general supervision of the system of public education in Ohio. That statute enumerates certain powers granted the Board and provides those powers are "in addition to the powers otherwise imposed on the state board under provisions of law."

Among its enumerated powers, the Board exercises "policy forming, planning and evaluative functions for the public schools of the State," "leadership in the improvement of public education in Ohio," and "administration of the educational policies of this state relating to public schools . . . ." The Board is further required to "prepare

and submit annually to the governor and general assembly a report on the status, needs and major problems of the public schools of the state of Ohio, with recommendations for necessary legislative action." R.C. 3301.07(G).

The Board must formulate and prescribe minimum standards for such matters as curriculum, teacher certification, instructional materials, school administration "and such other factors as the board finds necessary," R.C. 3301.07(D). Since 1966 the State Department of Education has made periodic inspections of various school districts to review compliance with certain legal minimum standards. School facilities are on-site inspected. The student population, teacher population, and physical plant are inspected. After the inspection, some local districts have been ordered to make changes to comply with the state-promulgated standards. The Board must classify and charter school districts and individual schools within each district, and must revoke the charter of any district or school that fails to meet the prescribed standards. R.C. 3301.16.

Furthermore, the Board administers and supervises the allocation and distribution of all state and federal funds for public education, R.C. 3301.07(C). It has the duty to determine that such funds are distributed and used in accordance with law. The Board must withhold funds from school districts or schools that are not in compliance with legal requirements, unless for "good and sufficient reason" established to the satisfaction of the State Board and the State Controlling Board. R.C. 3317.01; former 3317.14.

State Board Policy

During the years following its creation, the State Board established a policy regarding racial segregation. Although never reduced to writing, it nevertheless is discernible. Unlike its activities in other areas, the Board

operated with a few narrow exceptions according to a "hands-off" policy in the area of school desegregation. Rather than using its supervisory powers to inquire into the possibility of law violations and its pursestrings to enforce compliance with the law, the Board developed policies and practices which effectively disabled it from acting at all in this area, thereby avoiding its obligations in the first instance to ferret out constitutional violations with the foreseeable result of maintaining and condoning constitutional violations by local boards. This conclusion is based on the following findings.

I.

From its inception, the Board was aware of litigation involving racial segregation elsewhere in Ohio. (Tr. 5758.)[1] Litigation in the public schools of Hillsboro, Ohio, had begun in 1955, and by the time of the Board's first meeting in January 1956 the Court of Appeals for the Sixth Circuit had rendered its decision (Tr. 5810-11). The District Court had found that black elementary children were being segregated into one of the schools, and the Court of Appeals ordered that they be admitted to the other schools on a nondiscriminatory basis (Tr. 5867). *Clemons* v. *Board of Education*, 228 F.2d 853 (6th Cir. 1956).

This litigation prompted discussion at an early State Board meeting about the possible existence of illegal racial segregation elsewhere (Tr. 5759). The minutes reflect the substance of those discussions. (Exhibit S-13, pp. 1-4.) Charles Lucas, a board member from the Cleveland area, referred to "allegations that the State of Ohio still has remnants of segregated schools." He therefore moved to have the State Board establish a committee to obtain its own set of facts regarding segregated schools in Ohio. The motion was defeated. Instead the Board adopted a resolution stating that "the determination of what constitutes unlawful segregation is a matter for judicial decision"

and declaring that "in any case where courts have made final determination that unlawful segregation exists, this Board would then take action in accordance with the law." (Tr. 5760-61.) When Board members were discussing segregation at that time they contemplated discrimination of the kind condemned in *Brown I* – the intentional segregation of pupils on the basis of race (Tr. 5761).

In May 1956, Mr. Lucas presented another resolution in which the Board would acknowledge that remnants of racial segregation existed in Ohio, insist that each school comply with laws requiring equal treatment and declare that the Board would withhold funds from any district operating a racially segregated school after September 1956. (Tr. 5817; Exhibit S-13, p. 3.) He did not identify such districts (Tr. 5761-62; 5812-13; RH Tr. 126), nor did any other Board member identify any district in which racial segregation was believed to exist. (Tr. 5672.) This motion, too, was defeated.

II.

Board Member Lucas was dissatisfied with this position and urged the adoption of a resolution which would require the Board to seek out districts in which segregation might be practiced. (Tr. 5759.) However, a majority of the Board was of the opinion that this was beyond the scope of its authority. (Tr. 5760.) After further discussion it was agreed that an opinion of the Attorney General of Ohio should be obtained regarding the scope of the Board's authority in this area. (Tr. 5763.) Accordingly, at the June 1956 meeting the Board adopted a resolution requesting the Attorney General to give the Board an opinion on four questions concerning the Board's authority to investigate school districts and withhold funds if they should be in violation of law (Tr. 5764-66; Exhibit S-13, p. 4).

The July 1956 Attorney General's responsive opinion stated:

> 1. The term 'law' as used in section 3317.14, Revised Code [presently codified at Ohio Rev. Code Ann. § 3307.01 (Page Supp. 1977)] forbidding the distribution of state funds to school districts which have not 'conformed with the law,' is used in the abstract sense and embraces the aggregate of all those rules and principles enforced and sanctioned by the governing power in the community. Such term embraces the equal protection provision of the Fourteenth Amendment of the Constitution of the United States under which *the segregation of pupils in schools according to race is forbidden.*
>
> 2. The *primary responsibility for administering the laws* relating to the distribution of state and federal funds to the several public school districts *is placed with the state board of education*, subject to the approval of the state controlling board.
>
> 3. *It is the responsibility of the state board of education in the first instance to determine whether a particular school district, or the board of education of such district, 'has not conformed with the law' so as to require the withholding of state funds from such district.* In making such determination the state board of education should observe the requirements of the Administrative Procedure Act, Chapter 119, Revised Code, as to notice, hearing, summoning of witnesses, presentation of evidence, degree of proof, and procedural matters generally.
>
> 4. Following a determination by the state board of education that a school district 'has not conformed with the law' so as to require the withholding of state funds as provided in Section 3317.14, Revised Code, such board and the controlling board, acting separately, may, for 'good and sufficient reason' established to the satisfaction of each board, offer a distribution of funds to such district notwithstanding such lack of conformity with the law.

1956 Op. Atty. Gen. Ohio 514, 520-21 (emphasis added). The Attorney General also stated that in the specific area of racial segregation, the fund-withholding provision was mandatory:

> It follows, therefore, that in those cases in which your board finds as a matter of fact that racial segregation exists in a particular school district, the restrictive provisions of § 3317.14, Revised Code, must be deemed to apply.

Id.

After the receipt of the opinion of the Attorney General, it was clear to the State defendants that they had the primary responsibility and the power to investigate and determine whether local school districts were unlawfully segregated. Moreover, both State defendants were aware that there was an affirmative duty to act to eliminate unlawful segregation after becoming aware of its existence. As noted by the Court of Appeals, the parties appear to agree that the Attorney General's opinion is law which controls the State Board. *Penick* v. *Columbus Board of Education, supra,* 583 F.2d at 817.

However, the State Board did not, during the period from 1956 until at least 1968, use its investigative powers to uncover the unlawful segregation of public schools in Columbus or elsewhere.

The rationale for the Board's failure to investigate advanced by different board members is twofold. Certain members contended that a prerequisite to any such action was the presentation of a complaint to the Board. Others believed that it was for the courts, and not for the Board, to make a determination whether segregation was unlawful. These contentions are discussed hereinafter.

The Necessity of a Complaint

The Court has heard repeated assertions that the reason for the Board's inaction was its lack of knowledge

of illegal segregation and that had such a problem been brought to its attention, it would have acted swiftly and promptly to investigate and use its powers to rectify any such problem.

Thus, a former State Board member, an attorney, testified that after the receipt of the Attorney General's opinion up until he left Board service in December 1959, no person or organization ever reported to the State Board or complained about unlawful segregation existing anywhere in any school district in the State of Ohio. When asked what the Board would have done in case an instance of unlawful segregation were ever brought to its attention, he testified:

> There isn't the slightest doubt in my mind that our Board would have acted promptly and affirmatively to work toward discontinuing any such segregation. I would say that the final, the last remedy, would have been withholding funds because it would have been an act directed against a great many innocent children of all races, but it would have acted against the individuals who were running such school districts, whether the Board or the Superintendent or whoever, in order to get them straightened out and headed in the right direction.

Similarly, another State Board member, also an attorney, testified as follows:

> Q. Suppose, sir, that the State Board became aware of unlawful activity on the part of a school district, now, under the attorney general's opinion and the statute, which is 3314.17, the State Board would have the right to withhold funds, but instead of going to the ultimate remedy, what, if anything, would the State Board attempt to do to correct the illegality?
>
> A. Well, we would try, I'm sure, to get them to stop doing whatever illegal thing they were doing.

(Tr. 5874.)

Dr. Martin Essex, State Superintendent of Public Instruction for ten years, acknowledged that the State Board has the capacity to conduct an investigation and make a finding in the area of racial discrimination or isolation (Tr. 6027). If unlawful discrimination were discovered, "then a recommendation would go to the Board relating to the withholding of funds." (Tr. 6027.) According to Dr. Essex, if a responsible parent or group of parents would allege an unconstitutional separation of races in an Ohio school district, the Board would "traditionally order an immediate investigation in the matter." (Tr. 6020.) There were two instances, he stated, in which the State Board was asked to investigate a claim of segregation in Ohio. These instances occurred in North College Hill and Dayton and are discussed below.

Dr. Essex testified that during his term in office no complaint of unlawful segregation in the Columbus schools had been made; furthermore, he had no reason to consider the Columbus District in violation of the law.

There is considerable difficulty with the claim that a complaint was a prerequisite to action by the Board. First, the State defendants did not have any formal complaint procedure. Apparently, complaints about all sorts of school-related matters could be and were presented to the Board by letter, by petition, or in person. Moreover, any member of the Board can present to the Board a complaint that has been made to that particular Board member. However, the Board neither publicized how a complaint should be lodged with it, nor when and where the Board held its meetings at which complaints could be presented.

Second, there were, over the years, several instances which might reasonably be considered complaints, but which did not prompt action by the Board or its predecessors. The record establishes that as early as 1953, Mr. Barbee W. Durham, Executive Secretary of the Columbus

NAACP, wrote to Mr. Clyde Hissong, State Superintendent at the time, complaining that the Columbus Board of Education had never hired Negro teachers on the secondary level (Pl. Exhibit 372). There is no evidence that any action was taken by anyone at the State level on Durham's letter. Next, Mr. Lucas' proposals in 1956 were rejected, in part because he did not have proof of unlawful segregation in any particular districts or schools. As is shown below, a thorough and extensive complaint submitted in 1971 was not acted upon.[2]

Finally, it is clear that the Board could act without first being presented with a complaint. This finding has support in the testimony of former Superintendent Essex himself:

> The State Board is not restricted to functioning on complaints. The State Board can initiate action if it so decides that the facts warrant initiating action or if there is evidence to that [effect] that would lead to the conclusion that there is reason to initiate action.

(Tr. 6136.)

It is noteworthy that the State Board did not wait for a complaint before it inspected schools to determine whether they complied with state-prescribed standards in other areas such as teacher certification. The investigatory process is routine in the area of determining whether Ohio school districts are in conformity with certain legislative and State Board-promulgated minimum standards. The State defendants, without complaint, probe into standards concerning school days, pupil promotion, admission of pupils to schools and programs, graduation requirements, teacher certification, and others.

The Necessity of a Judicial Determination

The other assertion made by the State defendants is succinctly stated in their proposed finding of fact, which is as follows:

> Prior to the late 1970's and the Supreme Court's opinions in *Dayton II* and *Penick*, it was the Department's judgment that it had no reasonable alternative but to wait until it received some notice of an unlawful condition before launching an investigation into the reasons for racial imbalance in a school district (RH, Bowers, 175). The Department believed that prior to those decisions it could lead and persuade, but it could not compel the elimination of racial imbalances which were the result of neighborhood concentrations. *Id.*, 172-173.

This policy was officially adopted by the Board in its resolution of March 1956, in which it declared.

> WHEREAS the determination of what constitutes unlawful segregation is a matter for judicial decision, and
>
> WHEREAS, the State Board of Education has neither the means nor the right to take action on this question without final determination by the courts,
>
> BE IT RESOLVED THAT in any case where courts have made final determination that unlawful segregation exists, this Board would then take action in accordance with the law.

(Exhibit S-13; Tr. 5760-61.)

The unsettled-nature-of-law theory has some surface attraction, but upon examination is not at all convincing. Surely, at least after 1956, the State defendants knew that (1) intentional segregation of school children by race violated the United States Constitution; (2) the State Board in the first instance had the responsibility to determine whether a particular school district, or the board of education "has not conformed with the law." 1956 Op. Atty. Gen. Ohio, *supra*, at 520. The choice of language made by the then Attorney General is straight-forward and without ambiguity. Neither the investigation in Dayton nor that in North College Hill was hampered by any unsettled condition of the law. At trial, State Board member Wayne Shaffer testified:

I believe that the United States Constitution ought not to be interpreted by the State Board of Education, quite honestly. I think it's being properly done in the courts, and I believe that that's where it ought to be done.

However, when referred to this testimony by Mr. Shaffer, Dr. Essex testified as follows:

Q. . . . . Now, my question to you, Dr. Essex, is, is the State Board able to determine whether a school district is in violation of the U.S. Constitution?

A. My answer to that question, Mr. O'Neill, is in the affirmative. It is yes. I have not discussed this matter with Mr. Shaffer since his appearance here. Hence, I do not know his rationale. I draw the assumption Mr. Shaffer was referring to an earlier period in the Board's history when it was first established in '56 and prior to the establishment of our office of Urban Education.

Q. I am not asking you to, you know, interpret what he was thinking of or what he might –

A. There is no question but what the State Board has the capacity to conduct an investigation and make a finding or make a recommendation or take action in the area of racial discrimination or isolation.

Q. Now, how does the State Board of Education make a determination that a school district is in violation of law?

A. It would be a preliminary exploration to determine some facts or the conditions that might be prevailing in that district to see if there is a violation of law. Then if brought to the attention of the district, which would be the common practice, and the district is unable or unwilling to correct what we perceive to be a violation of discrimination, then a recommendation would go to the Board relating to the withholding of funds.

He further related an available state procedure to litigate whether a violation of law exists.

1968 and After

It was not until 1968 that the State Board began to use its investigatory powers to determine the extent of racial isolation in the schools.

In early 1968, Superintendent Essex asked Dr. Robert O. Greer to come to Columbus to assist the Department of Education and the State Board in setting up a Division of Urban Education. (Tr. 5915.) Dr. Greer came to Columbus in February and became head of an Office of Urban Education, bearing the title of Assistant Superintendent for Public Instruction. (Tr. 5917.) The Office of Urban Education was one of the first of its kind in the United States. Dr. Greer met in Cleveland with an *ad hoc* committee of the Ohio Civil Rights Commission and members of the Urban League, the NAACP, and other concerned groups. Together they drafted a policy statement that was adopted at the May meeting of the State Board. This statement provided, in part:

> It is the policy of the State Board of Education that, in programs administered, supervised, or controlled by the Department of Education, every effort shall be made to prevent and to eliminate segregation of children and staff by reason of race or color.

(Exhibit S-13, p. 136.) As part of the statement, the Board recommended:

1. Specific effort on the part of all school districts to find ways to move toward the solution of the problems of *de facto* segregation;
2. A periodic ethnic count of pupils and employees by the schools of the State as a realistic basis for program planning.

On July 8, 1968, the State Board passed a resolution to implement the policy statement by conducting a statewide

survey of hiring practices and racial balance in all Ohio schools. (Exhibit S-13, p. 14.) The survey was conducted and the findings were computerized, compiled, published and distributed to the State Board, the Department, and to the public. Dr. Greer described the survey as follows:

> We went out to survey the entire state because we didn't know what the situation was. I had to tell myself or find out for myself what is the situations in the urban centers in Ohio? So we used 300 schools, high schools, junior high schools and elementaries, surveyed them intensely, a full evaluation with elementary secondary personnel. We employed ten specialists to go along with these teams who were no longer in education, men and women, and we went through the districts and took them apart.
>
> We added a survey on urban problems. We went into the issues of how the children are placed. How are they placed in regular classes and special classes? Are there vocational educational offerings? Is there funding for disadvantaged students? Do you have anyone who knows how to handle curriculum development? Are your teachers prepared to teach all kinds of children? These kinds of things we did.

This survey has been conducted annually (Tr. 6080). The first complete report was published in June 1970. It clearly revealed the racial imbalance in the assignment of administrative and teacher personnel in Columbus. The State defendants well knew as a result of their own survey that as late as the 1972-73 school year there were 250 black elementary teachers, representing 63.3% of all the black elementary teachers in the system, assigned to schools in which the students body was 80-100% black. In the same year, 34 elementary schools, all of which contained 80-100% white student bodies, had no black teachers assigned to them. (T. 6004.) *See Penick* v. *Columbus Board of Education, supra,* 429 F. Supp. at 238.

This matter was the subject of a 1974 conciliation agreement with the Ohio Civil Rights Commission after a

complaint had been filed by the Columbus Area Civil Rights Council and after Dr. Connell had called the practice to the attention of a high state department official in 1971. This form of selection of assignments on a racial basis was obviously intentional.

The survey identified Columbus as having persistent problems of racial isolation, a condition which continued at the time of trial in June 1976 (Tr. 5978). The same result was made known to the Board by virtue of a similar survey conducted by the Ohio Civil Rights Commission with the help of Dr. Greer's office in 1968 (Tr. 5982-84).

The State Department has had repeated contact with the Columbus district since 1968 through both the Department of Urban Education, headed by Dr. Greer, and the later-established Office of Equal Educational Opportunity, headed by Mr. Bouldin. The State Department visits annually those districts most in need of desegregation assistance, among them Columbus. During these many contacts, the entire situation in the school district is discussed and information has been given to Columbus concerning the availability of federal funding to assist in the development of a desegregation plan. On several occasions, the State Department was asked by Columbus district staff to consider whether Columbus faced the possibility of litigation arising out of the racial isolation of its schools. (Tr. 5952-55, 5979, 5987.) It was upon the request for assistance of the Director of Human Relations for the Columbus Board that Dr. Greer came to the Columbus District (Tr. 5952). Columbus District officials made specific requests for information to develop means to eliminate its segregated schools, and in return many of the desegregation devices and techniques available and used elsewhere were presented to them. As stated by Dr. Greer:

> . . . we went over these figures as they were submitted and informed the principals and the administrators at central office that a problem did seem to exist. All we could tell them was that they did have

racial impaction. We couldn't define it as being one kind of segregation or another for the simple reason that there were buildings that were at that time completely integrated.

(Tr. 5952-53.) The Columbus officials were, however, advised by Dr. Greer's office that the open enrollment plans which they were formulating would be constitutionally deficient, because of the extent of racial impaction and isolation.

Although these personal contacts and discussions occurred steadily from 1968 through 1975, at no time did the State Department or the State Board initiate any investigation into the causes of the segregation admittedly existing in Columbus.

Although the Board offered "technical assistance" to the District concerning school desegregation, it never used its powers to enforce compliance with the Constitution. Dr. Greer attributed this to a lack of power to do so:

Q. Did you ever demand, insist, that Columbus use the integrative techniques you suggested?

A. Oh, no, no.

Q. And why not?

A. Demand on what basis? You can demand all you want to without — without the power of final authority, and all you do is offend. You can't get anyplace by demanding without the clout to follow up the demand.

(Tr. 5956-57.)

The Court finds the testimony of State Board member Wayne Shaffer accurately reflects an attitude of a majority of the State Board from its organization in 1956 until this lawsuit was filed:

Q. All right. Why, Mr. Shaffer, hasn't the State Board demanded that Columbus try some specific remedy for the racial concentrations that exist in some

parts of a district such as boundary line changes or pairing or clustering of schools? Why haven't they asked to try some specific device respecting the assignment of children to schools?

A. I don't think we have any authority with respect to the assignment of pupils, and to request or demand or ask, whatever your term is, that they do something over which we have absolutely no authority, it seems to me would be a vain act on our part, not likely to produce any results, and might even be counter-productive.

Q. Does the State Board require the Department to recommend and to assist and to advise districts with respect to techniques and devices that might be used to reduce racial isolation?

A. Yes, I think that – that is the case.

Q. You advise and suggest, but you do not demand; is that it?

A. Correct.

(Tr. 5874-5876.)

In fact, the State Board knew by virtue of the 1956 Attorney General's opinion that it had the authority to investigate for non-conformity with the law and recommend a withholding of funds in the event they found such violations. The Board did not even consider using the sanction of fund withholding until 1978; yet the Board's power to use it remained unchanged over the years (RH Tr. 24). Similarly, the Board has vigorously used its powers to revoke school or district charters over the relevant period for non-compliance with minimum standards. (C. Tr. 2309-23.) Yet this power was never exercised to facilitate the dismantling of segregated systems.

The Court concludes that although there were available procedures for the discovery of unlawful segregation in Ohio, and the Board had the authority to remedy it, there was great reluctance to self-initiate any inquiry, and

even more reluctance to exercise its power by withholding funding or using other available means as sanctions for a local district's maintenance of unconstitutional racial segregation.

The Office of Urban Education regularly published a "Mini Journal." It presented court decisions and other laws, and articles by desegregation specialists. The Office also published a "Maxi Journal." Volume II for June 1970 contains a "complete racial and educational survey of the impaction of students and staff and non-professional staff with a breakdown of percentages run by county, by district, by state." (Tr. 5937.)

The Department maintained a desegregation library and conducted workshops and seminars. The Office secured $300,000 worth of operational funds for the Kent State Desegregation Center to meet with districts across the state, to discuss the issues of desegregaion, why it should be done and how it could be done. (Tr. 5933.) Desegregation Centers were also established at both Central State and Ohio State Universities.

In sum, the officials at the State Department of Education appear to have been as knowledgeable as any agency in the United States on the subject of segregation in public schools. Any assertion that the State defendants believed everything in Columbus was proper since they believed schools were being built in the neighborhood where growth occurred is a meritless over-simplification in light of the facts of this case.

In the Spring of 1971, Dr. Kenneth Connell conferred with Robert Greer, Arthur Bouldin, and representatives of the United States Office of Civil Rights and the Columbus Area Civil Rights Council. Dr. Connell, a consulting psychologist, had been an active member of the Northwest (Columbus) Area Council for Human Relations and the Columbus Area Civil Rights Council for several years.

Dr. Connell presented to Dr. Greer a 60-page document prepared by the Northwest Area Council relating to

proposed litigation over the segregation of staff and students in Columbus schools (Tr. 6248). He described the document as follows:

> It . . . related to the non-response of the Columbus Public Schools to a proposed center for quality integrated education. It included review of findings of the select committee on equal educational opportunity. It included a variety of specific statistical information relating to the Urban League report, the OSU Advisory Commission report, staff segregation as reported in those reports, and a separate analysis I did.
>
> It further provided a summary of certain building projects and their segregative effects in the period, I believe, 1969 through '71, so that it substantially set forth the basic case as we saw it at that time for a finding of unlawful segregation.

(Tr. 6250-51.)

Dr. Connell further testified:

> Q. Did you bring the details of this matter directly to the personal attention of Dr. Greer, or is it just something you left with him?
>
> A. No, we discussed the matter in considerable detail with respect to what the posture of HEW might be, what kinds of factors they looked at in establishing whether the district was in compliance. We talked with Dr. Greer about the role of the State Department of Education in this matter.
>
> He subsequently did provide some materials, but provided no indication that they had a standard investigation process or that they could be of any substantial help with this matter, whether or not it went to litigation.

Dr. Connell stated that they met with Dr. Greer and persons on his staff "to determine what might be available through the State Department and HEW, and we did not know what could be available." (Tr. 6258.) "The purpose of the meeting was to determine what assistance could be

rendered by the State Department of Education and HEW in remedying the segregation that we observed in the Columbus Public Schools." (Tr. 6260.) Connell described the meeting as cordial but not productive of any results. He stated:

> When the bond issue failed in the spring of that year, that was when the Columbus Area Civil Rights Council and the Northwest Area Council turned to the Ohio Civil Rights Commission. We were never advised to do so by the Department of Education, Dr. Greer, but we turned there because we felt that there was an opportunity for some partial remedy at that time.

Discussion

As mentioned hereinabove, the Court of Appeals provided this Court with five suggested areas of inquiry. The Court will now address them. Several areas are combined for discussion.

The State Board's Knowledge of Intentional Segregative Practices, Failure to Protest or Restrain them by Withholding Funds and Continuance of Support in the Face of Such Knowledge

The history of public education in Ohio advises all concerned that at one time in Columbus, as well as in other cities, separate schools were intentionally maintained for colored children. Columbus last reported separate schools in the annual statistical report to the Department of Education for 1953-54. The "separate schools" category was deleted after the decision in *Brown I, supra.* When that category was first made a part of the reporting requirements, a fair inference may be that it requested data concerning intentionally segregated schools for colored children. This inference fits with the sorrowful history of the creation of such schools. However, there is no direct documentary evidence that the schools Columbus listed under

that heading in 1954 were separate as a result of segregative design. The Court notes that in its prior opinion, it reached that conclusion regarding some Columbus schools, but only with further specific facts which may not have been available to the State defendants.

Given the bare information that Columbus had a number of separate schools for colored children in 1954 does not justify the inference that such schools were intentionally segregated or never dismantled after having been so segregated. This is so because laws requiring separate schools for colored children were eliminated years before. There simply must be a stronger factual basis for drawing the inference plaintiffs would have the Court draw. The reporting data are significant, however, as mentioned hereinafter.

The Court does find that the State Board did, at least upon learning the results of their own 1968 survey, have knowledge of one of the intentional segregative practices of the Columbus defendants. The State Board was aware of the general practice of assigning black teachers only to those schools with substantial black student populations, found by this Court in its 1977 opinion and noted by the Supreme Court on its review. The Board, however, continued to fund and otherwise support the Columbus District in the face of such knowledge. They did not protest the practice; instead, it persisted until resolved by a consent decree between the Columbus defendants and the Ohio Civil Rights Commission in July 1974. *See Penick* v. *Columbus Board of Education, supra,* 429 F. Supp. at 238.

Motivation of the State Board in Failing to Investigate the Reasons for de facto Segregation (Racial Impaction)

The State Board can be charged with knowledge that *de jure* segregation of school children by race was imposed by state law until 1887. It can be charged with knowledge,

by virtue of the reporting requirements of its predecessors, that separate schools for black and white children continued to be operated until 1954 in Columbus and elsewhere in Ohio. Their own files contain documents identifying separate schools in Columbus. *See also Penick* v. *Columbus Board of Education, supra,* 429 F. Supp. 234-36. It further knew, by virtue of the *Brown I, supra,* opinion of the same year, that *de jure* segregation was unlawful and that a duty was lodged with the proper authorities to eliminate the racial isolation caused by unconstitutional acts. *Brown II,* 349 U.S. 294 (1955).

From its inception, the State Board had more than a "mere right to control" the activities of local school boards; it was explicitly given authority to supervise public education by the statute which created it. R.C. 3301.07. Its predecessor failed to exercise such supervision in 1953 when asked to do so by letter from Mr. Durham. The Board itself refused to inquire into allegations by one of its own members, Mr. Lucas, in 1956, that "remnants" of segregated schools persisted.

The State Board's supervisory obligation was spelled out clearly by the Ohio Attorney General's opinion in 1956. Thereafter, any contention that the State Board did not bear the primary, statutory duty, *in the first instance,* to investigate the existence of segregation in the public schools, to ascertain its causes and to use its powers to eradicate it, "root and branch," is without justification.

Instead, the State Board adopted a "hands-off, let someone else do it" approach which amounted to no approach at all. This neutrality overrode the Board's clearly prescribed mandatory affirmative duty as opined by the then Attorney General. Rather than disavow or contest the substance of the legally described solemn obligation of the Board, for a number of years the Board simply chose to ignore it. Although there is no evidence that the Board did not recognize and appreciate the correctness of the opin-

ion's prescription, since its creation the Board has, in effect, related that it would not do its duty unless someone informed it that its duty needed to be done.

The Board avoided its duty of investigating school segregation by pursuing an unwritten policy of requiring "complaints" rather than initiating its own investigation. This policy of requiring complaints was curiously unique. In no other area of its supervision did the Board require complaints prior to investigation.

The effectiveness of the complaint system in preventing investigations was compounded by the Board's failure to tell the public that the complaint system was in fact being used. The Board was thus both unwilling to investigate by its own initiative and apparently unwilling to tell the public how to trigger an investigation. The result was almost total insulation. *See* footnote 2, *supra*. Even after the formation of the Office of Urban Education with its substantial assembly of information concerning the Columbus schools and expertise in modern school segregation matters, the State Board continued to take the position that there was no reasonable cause to take a look to determine whether Columbus had a problem with the United States Constitution.

There is, indeed, no evidence that the State defendants made any effort to self-initiate any investigation into the cause of the racial impaction of any urban school district in Ohio. *See Reed* v. *Rhodes*, Case No. C73-1300 (N.D. Ohio September 23, 1980); *Brinkman* v. *Gilligan*, 503 F.2d 684 (1974). While the knowledge that the Court has found on the part of the Board, other than that relating to faculty assignments, does not rise to the level of actual knowledge of intentional segregative practices as described by the Court of Appeals, the Court does find that it rises to such a level that would cause a reasonable person, charged with the same legal duties as are the State defend-

ants, to initiate an investigation into the causes of segregation in the Columbus public schools. This was never done.

Given the contents of the files of these defendants, and the vast amount of their admitted expertise in desegregation matters, any presumption that all of the racial imbalance in Columbus resulted from racially neutral causes is unreasonable. Reason dictates that there was ample cause to inquire whether Columbus was in conformance with the requirements of the Constitution.

In the Court's view the failure to investigate was another manifestation of the enduring policy of the State Board to let some other governmental agency handle this emotionally charged issue. This was in clear derogation of the Board's obligation under the law.

Effect of the Above Findings under Dayton I (Incremental Segregative Effect)

In an earlier opinion this Court discussed a reciprocal effect between the color of the school and the color of the neighborhood it serves.

> The racial composition of a neighborhood tends to influence the racial identity of a school as white or black. This identification comes in the form of student, teacher, and administrative assignments as well as the location and attendance boundaries of the school. When the number of black pupils increases, the number of black teachers increases, and a black principal is assigned; the school then becomes less attractive for white students to attend. The racial identification of the school in turn tends to maintain the neighborhood's racial identity, or even promote it by hastening the movement in a racial transition area. White families tend to cease migrating into such a neighborhood, and tend to move out of the area.

Penick, supra, 429 F. Supp. at 259.

After 1968 the data collected by the State defendants clearly revealed the segregated fashion in which teachers

and administrators were intentionally assigned. It is reasonable to infer that the vast amount of information on school desegregation accumulated by the Office of Urban Education included comment on the reciprocal effect of the assignment of teachers and staff on a racially segregated basis. Surely, the logical result of biased assignment of personnel was well known to the experts at the State Department of Education. The State defendants again failed to act to correct this intentional practice of the Columbus defendants which directly contributed to the racial imbalance in the schools.

In addition, the Court has found the State defendants were aware of circumstances concerning the Columbus school system that are sufficient to trigger their duty to investigate to determine whether the system was unlawfully segregated. Although there is no evidence of racial animus on the part of these defendants, the evidence certainly supports the inference that the State defendants reasonably should have known that in all probability Columbus had a substantial problem of unlawful racial segregation. The Court is convinced that the failure to investigate was an intentional failure to perform a duty required by law and that the only logical reason for such a failure is intentional condonation of the unlawful status quo. This failure in turn amounts to a proximate cause of plaintiffs' deprivation. The Columbus defendants had nothing to fear from the persons charged by the State of Ohio with the first line responsibility of assuring all Ohio's public school children lawful treatment. So, the unconstitutional state of affairs continued after the formation of the State Board, after it knew that historically Ohio had first required and later permitted separate schools for colored children, after receipt of the 1956 Attorney General's opinion, after the receipt of the statistics of the 1968 racial study, after the establishment of an Office of Urban Education, after notice of where schools were built in growing Columbus, after

Dr. Connell's visit, after the District Court's determination in *Dayton* v. *Brinkman, supra,* and long after school desegregation had become an agonizing issue in urban America. It cannot be said that the State defendants looked the other way while constitutional rights were thwarted; it can be said, however, that they closed their eyes knowing the law required them open.

If the State defendants had acted within a reasonable time after the receipt of the 1956 Attorney General's opinion, even working at a slow pace, the Columbus schools could have been directed towards and have achieved an appropriate remedy long before this lawsuit was filed. Failure to have done so causes this Court to conclude that the State defendants equally share with the Columbus defendants the responsibility for the system-wide unlawful segregation in the Columbus School District.

ORDER

It is ORDERED that the State Board of Education and the State Superintendent of Public Instruction, their officers, agents, and employees, and all other persons in active concert and participation with them be, and they hereby are, permanently enjoined from discriminating on the basis of race in the operation of the Columbus Public Schools, and from creating, promoting, or maintaining intentional racial segregation in any Columbus school facilities.

It is further ORDERED that the State defendants share equally with the Columbus defendants all expenses incurred or which will be incurred in remedying the unconstitutional racial segregation found in this case in the Columbus School District.

ROBERT M. DUNCAN

Robert M. Duncan, *Judge*
United States District Court

[1]References to the transcript of the original trial in this case are identified as "Tr."; those to the transcript of the hearing on remand are identified as "RH Tr."; and those to the portions of the Cleveland trial transcript admitted into evidence in this case at the hearing on remand are identified as "C Tr.".

[2]The Board did take action in two other school districts in Ohio. Thus in 1964, after an appearance before the State Board by an NAACP representative who complained of unlawful segregation at the North College Hill District, the State Board ordered by resolution that an investigation ensue and the District resolved the problem by closing a school. (Tr. 6021.)

In the situation involving Dayton, in 1970 the Dayton City School District adopted a resolution stating that it believed that prior practices of its board had unlawfully created segregation and requesting State Board assistance in correcting the situation. Dr. Essex testified that "a committee appeared before the State Board and requested assistance from the State Board in resolving what their Board had declared to be and their Superintendent had declared to be violations of – or discriminatory actions against minority persons in the operation of the schools" (Tr. 6022).

The State Board wrote to the Dayton Board:

> On June 7, 1971, the Ohio State Department of Education presented a series of recommendations to the Dayton Board on how to achieve constitutionally required desegregation. In its letter conveying the recommendations, a State Department of Education report stated:
>
> "As the resolution of April 29, 1971 (of the Dayton Board), admitted 'the Dayton Board of Education recognizes that unequal educational opportunities for minority students now exists.' Inequality of such opportunities, for minority *and* majority students, has characterized the Dayton public school system throughout its history.

> "Since the Board, *as an agency of state government*, has created the inequality which offends the Constitution, the Ohio State Department of Education must advise that the Dayton Board of Education clearly has an affirmative duty to comply with the Constitution; that is, as the Supreme Court has stated, 'to eliminate from the public schools all vestiges of state-imposed segregation.'"

After Board reference to the Superintendent for investigation, $8,000 was allocated to employ persons "from over the country who were knowledgeable in the area of segregation, integration, to make a scholarly investigation of the condition, make a report," (Tr. 6023). In addition to that, six or seven staff members were assigned to assist. The final allocation for the investigation personnel was about $43,000.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GARY L. PENICK, et al.,
Plaintiffs

v.

COLUMBUS BOARD OF EDUCATION, et al.,
Defendants

Case No. C-2-73-248

JUDGMENT

This action came on for consideration before the Court, The Honorable Robert M. Duncan United States District Judge, presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED THAT: the State Board of Education and the State Superintendent of Public Instruction, their officers, agents, and employees, and all other persons in active concert and participation with them be, and they hereby are, permanently enjoined from discriminating on the basis of race in the operation of the Columbus Public Schools, and from creating, promoting, or maintaining intentional racial segregation in any Columbus School facilities.

It is further ORDERED that the State defendants share equally with the Columbus defendants all expenses incurred or which will be incurred in remedying the unconstitutional racial segregation found in this case in the Columbus School District.

Dated at Columbus, Ohio this 8th day of January, 1981.

JOHN D. LYTER, *Clerk*

By: _____

Deputy Clerk

81-3072, 3102

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GARY L. PENICK, et al.
Plaintiffs-Appellees, Cross-Appellants,

vs.

COLUMBUS BOARD OF EDUCATION, et al.
Defendants,

and

OHIO STATE BOARD OF EDUCATION, et al.
Defendants-Appellants, Cross-Appellees.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed October 21, 1981.

Before: EDWARDS, Chief Judge, LIVELY and ENGEL, Circuit Judges.

Edwards, Chief Judge. This is the Columbus desegregation case[1] which has been returned to this court after our remand to the District Court for reconsideration and new findings of fact concerning the question of liability for unconstitutional segregation on the part of defendants-appellants Ohio State Board of Education and Ohio Superintendent of Public Instruction.

[1] *Penick* v. *Columbus Board of Education*, 429 F.Supp. 229 (S.D. Ohio 1977), *aff'd in part, vacated and remanded as to state defendants*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979), *opinion on remand to be published*, No. C-2-73-248 (S.D. Ohio, Jan. 8, 1981).

Our opinion affirmed the District Judge's findings of intentional segregation and liability against the local Board of Education. The District Judge had also found the State Board jointly liable for such intentional segregation. Our remand of this issue reads as follows:

> This record does not show any act on the part of the State Board which *required* the Columbus Board to pursue the segregative policies which the District Judge and this court have found. It also does not show any action that the State Board took affirmatively to desegregate the Columbus schools or even to use its statutory powers to investigate and make findings as to whether the Columbus schools were being operated within the law.
>
> The State Board's primary contention on this appeal is that it had no prior knowledge that the segregation existing in the Columbus schools was *unlawful* since it did not know that said segregation was derived from intentionally segregative policies on the part of the Columbus School Board. The State Board also argues that the District Judge did not make findings concerning the "incremental segregative effect" (*Dayton, supra*, 433 U.S. at 420, 97 S.Ct. 2766) of its actions upon the totality of segregation in Columbus.
>
> While we believe that what we have quoted from the District Judge's opinion must be regarded as a general finding of intentional support of segregation by the State Board, it may well be argued that the *Dayton* opinion requires more detailed findings of fact pertaining to 1) the State Board's knowledge (if any) of the Columbus Board's intentional segregative practices, 2) the State Board's failure to protest or restrain them by withholding funds, 3) the State Board's continuance of support in the face of such knowledge, 4) the motivation of the State Board in failing to investigate the reasons for de facto segregation, and 5) the effect of findings if any, under 1, 2, 3 and 4 above, as suggested in *Dayton, supra* at 420, 97 S.Ct. 2766.

Penick v. *Columbus Board of Education*, 583 F.2d 787, 818 (6th Cir. 1978).

We had also suggested in our remand that there might be need for reopening the record on this issue. On reconsideration, the District Judge did take additional testimony on the questions recited above. He thereupon entered lengthy findings of fact concerning the role which the State Board of Education and its Superintendent played in the years after 1954 when, after *Brown* v. *Board of Education*, 347 U.S. 483, all public school authorities had a clear duty to end any intentional segregative practices found in schools for which they were responsible.

The System-Wide Segregative Practices

At the outset, we observe that we do not write on a blank slate in this case. Following is the summary of the findings this court made in *Penick* v. *Columbus Board of Education*, 583 F.2d 787 (6th Cir. 1978), as quoted and approved by Justice White's majority opinion in *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979):

> And the Court of Appeals, responding to similar arguments, said:
>
> > "School board policies of systemwide application necessarily have systemwide impact. 1) The pre-1954 policy of creating an enclave of five schools intentionally designed for black students and known as 'black' schools, as found by the District Judge, clearly had a 'substantial' – indeed, a systemwide – impact. 2) The post-1954 failure of the Columbus Board to desegregate the school system in spite of many requests and demands to do so, of course, had systemwide impact. 3) So, too, did the Columbus Board's segregative school construction and siting policy as we have detailed it above. 4) So too did its student assignment policy which, as shown above, produced the large majority of racially identifiable schools as of the

> school year 1975-76. 5) The practice of assigning black teachers and administrators only or in large majority to black schools likewise represented a systemwide policy of segregation. This policy served until July 1974 to deprive black students of opportunities for contact with and learning from white teachers, and conversely to deprive white students of similar opportunities to meet, know and learn from black teachers. It also served as discriminatory, systemwide racial identification of schools." 583 F.2d, at 814.

443 U.S. at 466-467.

The District Judge's findings and conclusions on remand included the following:

> **State Board Policy**
>
> During the years following its creation, the State Board established a policy regarding racial segregation. Although never reduced to writing, it nevertheless is discernible. Unlike its activities in other areas, the Board operated with a few narrow exceptions according to a "hands-off" policy in the area of school desegregation. Rather than using its supervisory powers to inquire into the possibility of law violations and its pursestrings to enforce compliance with the law, the Board developed policies and practices which effectively disabled it from acting at all in this area, thereby avoiding its obligation in the first instance to ferret out constitutional violations with the foreseeable result of maintaining and condoning constitutional violations by local boards. This conclusion is based on the following findings.
>
> From its inception, the Board was aware of litigation involving racial segregation elsewhere in Ohio. . . .
>
> * * * *
>
> This litigation prompted discussion at an early State Board meeting about the possible existence of illegal racial segregation elsewhere. . . .

* * * *

In fact, the State Board knew by virtue of the 1956 Attorney General's opinion that it had the authority to investigate for non-conformity with the law and recommend a withholding of funds in the event they found such violations. The Board did not even consider using the sanction of fund withholding until 1978; yet the Board's power to use it remained unchanged over the years. Similarly, the Board has vigorously used its powers to revoke school or district charters over the relevant period for non-compliance with minimum standards.

Yet this power was never exercised to facilitate the dismantling of segregated systems.

The Court concludes that although there were available procedures for the discovery of unlawful segregation in Ohio, and the Board had the authority to remedy it, there was great reluctance to self-initiate any inquiry, and even more reluctance to exercise its power by withholding funding or using other available means as sanctions for a local district's maintenance of unconstitutional racial segregation.

* * * *

In sum, the officials at the State Department of Education appear to have been as knowledgeable as any agency in the United States on the subject of segregation in public schools. Any assertion that the State defendants believed everything in Columbus was proper since they believed schools were being built in the neighborhood where growth occurred is a meritless over-simplification in light of the facts of this case.

* * * *

The Court does find that the State Board did, at least upon learning the results of their own 1968 survey, have knowledge of one of the intentional segregative practices of the Columbus defendants. The State Board was aware of the general practice of assigning black teachers only to those schools with

substantial black student populations, found by this Court in its 1977 opinion and noted by the Supreme Court on its review. The Board, however, continued to fund and otherwise support the Columbus District in the face of such knowledge. They did not protest the practice, instead, it persisted until resolved by a consent decree between the Columbus defendants and the Ohio Civil Rights Commission in July 1974. *See Penick* v. *Columbus Board of Education, supra,* 429 F. Supp. at 238.

The State Board can be charged with knowledge that *de jure* segregation of school children by race was imposed by state law until 1887.

* * * *

The State Board's supervisory obligation was spelled out clearly by the Ohio Attorney General's opinion in 1956. Thereafter, any contention that the State Board did not bear the primary, statutory duty, *in the first instance,* to investigate the existence of segregation in the public schools, to ascertain its causes and to use its powers to eradicate it, "root and branch," is without justification.

Instead, the State Board adopted a "hands-off, let someone else do it" approach which amounted to no approach at all. This neutrality overrode the Board's clearly prescribed mandatory affirmative duty as opined by the then Attorney General. . . .

The Board avoided its duty of investigating school segregation by pursuing an unwritten policy of requiring "complaints" rather than initiating its own investigation. This policy of requiring complaints was curiously unique. In no other area of its supervision did the Board require "complaints" prior to investigation.

There is, indeed, no evidence that the State defendants made any effort to self-initiate any investigation into the cause of the racial impaction of any urban school district in Ohio. *See Reed* v. *Rhodes,* Case No. C73-1300 (N.D. Ohio, September 23, 1980);

Brinkman v. *Gilligan*, 503 F.2d 684 (1974). While the knowledge that the Court has found on the part of the Board, other than that relating to faculty assignments, does not rise to the level of actual knowledge of intentional segregation practices as described by the Court of Appeals, the Court does find that it rises to such a level that would cause a reasonable person, charged with the same legal duties as are the State defendants, to initiate an investigation into the causes of segregation in the Columbus public schools. This was never done.

* * * *

In the Court's view the failure to investigate was another manifestation of the enduring policy of the State Board to let some other governmental agency handle this emotionally-charged issue. This was in clear derogation of the board's obligation under the law.

* * * *

If the State defendants had acted within a reasonable time after the receipt of the 1956 Attorney General's opinion, even working at a slow pace, the Columbus schools could have been directed towards and have achieved an appropriate remedy long before this lawsuit was filed. Failure to have done so causes this Court to conclude that the State defendants equally share with the Columbus defendants the responsibility for the system-wide unlawful segregation in the Columbus School District.

Penick v. *Columbus Board of Education*, No. C-2-73-248, slip op. at 8-33 (S.D. Ohio, filed Jan. 6, 1981) (Citations to trial exhibits omitted.)

We have considered these findings against this record and accept them as not clearly erroneous.

The "Separate Schools for Colored Children" Reports

This record sheds new light on the state of knowledge of the State defendants – light which was not available

earlier. In research conducted preparing this case, plaintiffs found and introduced records showing that for many years after the abolition of Ohio's "black laws" which, until 1887, mandated separated schools for black and white children, the predecessors of the State defendants had accumulated statistics upon the operation of "separate schools for colored children," showing their existence at least through 1954, the year that *Brown* v. *Board of Education*, 347 U.S. 483, was decided. As the District Court carefully recounted, *Penick* v. *Columbus Board of Education*, No. C-2-73-248, slip op. at 8-9, the State defendants' predecessors required local school districts to report to the State Department of Education the number of black children attending schools classified as racially separate. The wording of this category suggests that it was designed to inform state educational authorities of how many schools in Ohio were specifically designated for colored children. According to records kept by the defendants, substantial numbers of the state's black children attended such separate schools. A 1929-31 report listed 1,269 Columbus colored children enrolled in "separate schools for colored children." And reports for the 1920's, 1930's, 1940's and 1950's continued to list such separate schools, with the Columbus school authorities reporting four such segregated elementary schools and one junior high school in most of these reports to their state superiors. This information continued to be sought until 1955, after *Brown* found such separate schools unconstitutional, at which time the State Department of Education removed the race-based questions from its reports.[2]

With such reports in hand, it is strange indeed to find the State defendants disavowing knowledge of the segregated conditions of the Columbus black school enclave (consisting, as stated above, of four elementary schools and

[2]The District Court's complete review of the State records on this subject is attached as an Appendix.

one junior high school) as found by the District Court, this court, and the Supreme Court of the United States in prior proceedings in this case.

The "No Knowledge-No Power" Defense

The State defendants insisted that they were unaware of any segregation in schools for which they were ultimately responsible, and that even had they known, they could not have acted on such knowledge.

It is difficult for this court to believe that these defendants could have been as totally ignorant as they now claim. Not only had they been informed by answers to questions they themselves posed (as detailed above), but segregated schools continued to be established in their own back yard. As the District Court found, despite the "abolition of statutory authority for separate schools for black children, the Columbus Board continued to establish new schools that were separate on the basis of race," creating, for example, the Champion Avenue School in 1909 as a separate school for blacks. *Penick* slip op. at 8. While it is, of course, true that the State defendants did not have the District Court's findings before 1977, we take notice that the State Board of Education and its Superintendent and staff were and are based in Columbus. They would be unable to avoid knowledge of the segregated conditions recited above which were basic facts of life in Columbus.

The principal defense that the State defendants advance for their failure to act to desegregate the Columbus schools after 1954 is that they had not been put on notice by any court decree that the racial isolation in the Columbus schools was illegal. We reject this argument completely. In 1956, acting on a request of the State defendants' predecessors [sic], the Attorney General of Ohio rendered an opinion which spelled out the law of Ohio concerning race discrimination in Ohio's schools and the

duty of the State defendants to act to prohibit such unconstitutional and illegal conditions. The Attorney General's opinion read:

> Accordingly, in specific answer to your inquiry, it is my opinion that:
>
> 1. The term "law" as used in Section 3317.14, Revised Code [presently codified at Ohio Rev. Code Ann. § 3307.01 (Page Supp. 1977)], forbidding the distribution of state funds to school districts which have not "conformed with the law," is used in the abstract sense and embraces the aggregate of all those rules and principles enforced and sanctioned by the governing power in the community. Such term embraces the equal protection provision in the Fourteenth Amendment of the Constitution of the United States under which the segregation of pupils in schools according to race is forbidden.
>
> 2. The primary responsibility for administering the laws relating to the distribution of state and federal funds to the several public school districts is placed with the state board of education, subject to the approval of the state controlling board.
>
> 3. It is the responsibility of the state board of education in the first instance to determine whether a particular school district, or the board of education of such district, "has not conformed with the law" so as to require the withholding of state funds from such district. In making such determination the state board of education should observe the requirements of the Administrative Procedure Act, Chapter 119, Revised Code, as to notice, hearing, summoning of witnesses, presentation of evidence, degree of proof, and procedural maters generally.
>
> 4. Following a determination by the state board of education that a school district "has not conformed with the law" so as to require the withholding of state funds as provided in Section 3317.14, Revised Code, such board and the controlling board, acting separately, may, for "good and sufficient reason" established

> [sic] to the satisfaction of each board, order a distribution of funds to such district notwithstanding such lack of conformity with the law.
>
> Respectfully,
>
> C. WILLIAM O'NEILL
>
> Attorney General

1956 Op. Atty. Gen. Ohio 514, 520-21.

No instructions could more clearly have defined the defendants' legal duty to require desegregation where intentional segregation exists.

The defendants argue that a complaint to the State Board of Education was a prerequisite to action and that no such complaints came before them. The lack of formal complaint procedure belies this argument as does the fact that several complaints which were brought before them were simply not acted upon. Clearly, the State Board could and can initiate action if necessary, without any complaint before it. *Penick* slip op. at 16-17.

The defendants also argue that the Second Circuit has established precedent which cuts against state liability in this case. See *Arthur* v. *Nyquist*, 573 F.2d 134 (2nd Cir.), *cert. denied*, 439 U.S. 860 (1978). After the Second Circuit entered strong findings of intentional racial discrimination against the Buffalo Board of Education, it turned to analysis of similar claims against the New York State Board of Regents. In relation to the state defendants, the Second Circuit found:

> The record is significantly different with respect to the state appellants. As early as 1960, the New York State Board of Regents issued a policy statement urging desegregation of New York's public schools. This expression of intent has been reaffirmed on many subsequent occasions.

In 1964, parents of Buffalo schoolchildren appealed to the New York State Commissioner of Education, charging that Buffalo had fixed the attendance zone of a junior high school in such a manner as to make the student population over 90% black. The Commissioner found that *de facto* segregation existed in Buffalo, and ordered the Board of Education to submit an integration plan within three months.[23] The Commissioner subsequently found this plan inadequate, and appointed an Advisory Committee to develop a satisfactory program.

The Buffalo Board of Education approved the proffered program "in principle," but then submitted a plan which the Commissioner found "disappointing and unsatisfactory." Finally, on January 30, 1968, the Board submitted a plan which the Commissioner found acceptable. The Board was then ordered to submit periodic reports on the implementation of the program.

This plan, had it been implemented, would likely have reduced racial segregation in the Buffalo schools, but the City's Common Council refused to appropriate funds to implement the Board's plan. In January, 1972, the Commissioner instructed the Board to submit a new desegregation plan; the Board refused to submit such a plan. The Commissioner then sent members of his staff to Buffalo in order to work with the Board in designing a desegregation plan. The Commissioner's staff submitted its recommendations to the Board in November, 1972, but the Board rejected the proposals.

Finally, in January, 1975, following recovery from a heart attack, the Commissioner issued a show cause order to the Buffalo Board of Education in which he threatened to exercise his statutory enforcement powers.

573 F.2d at 145-146.

---

[23] *Matter of the Appeal of Yerby Dixon*, 4 Ed.Dept.Rep. 115 (1965).

From what we have already said above, it is obvious that the Ohio Defendants took no such actions in the Columbus case. *Arthur* v. *Nyquist, supra* is not in conflict with our preceding findings in this case nor with the summary which follows.

Conclusion

We now turn to the list of findings which were sought in our remand of this case.

As shown above in this record and as found by the District Court:

1. The State Board had direct knowledge of the Columbus Board's intentional school segregative practices.

2. Under the laws of Ohio, the defendant State Board of Education and its Superintendent had "the primary responsibility" for determining whether its school districts (including the Columbus Board of Education) "has conformed with the laws."

3. The State Board never, in relation to Columbus, discharged its legal "responsibility . . . to determine whether a particular school district or the board of education of such district 'has not conformed to the law' so as to require the withholding of state funds from such districts."

4. To the contrary the record shows that the State Board continued to support the Columbus Board's activities including (among others) financing racially segregated teaching staffs, and segregated schools.

5. The motivation (and the effect) of the State Board on this total record must be held to be the perpetuation of racial segregation.

6. The incremental effect of the State Board's actions and inaction is the total failure of compliance with the constitutions and laws of the United States and of Ohio in the performance of the duty to eliminate racial segregation in the Columbus School system.

The judgment of the District Court is affirmed.

FILED
OCT. 21, 1981
JOHN P. HEHMAN, Clerk

Nos. 81-3072
81-3102

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY L. PENICK, et al.,
Plaintiffs-Appellees, Cross-Appellants,

vs.

COLUMBUS BOARD OF EDUCATION, et al.,
Defendants,

and

OHIO STATE BOARD OF EDUCATION, et al.,
Defendants-Appellants, Cross-Appellees.

APPEAL from the United States District Court for the Southern District of Ohio.

JUDGMENT

Before: EDWARDS, Chief Judge, LIVELY and ENGEL, Circuit Judges.

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiffs-Appellees, Cross-Appellants, recover from Defendants-Appellants, Cross-Appellees the costs on appeal, as itemized below, and that

execution therefor issue out of said District Court, if necessary.

Entered By Order Of The Court

_____

Clerk

A True Copy.

Attest:

_____

Deputy Clerk

Issued as Mandate:

COSTS:

Filing fee ..... $
Printing ..... $
Total ..... $

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT A. REED, et al., *Plaintiffs* vs. JAMES A. RHODES, et al., *Defendants*	C73-1300 MEMORANDUM OPINION AND ORDER

Battisti, C. J.

On August 23, 1979, the Court of Appeals for the Sixth Circuit remanded for further consideration this Court's findings that the Ohio State Board of Education and the Superintendent of Public Education were liable for the intentional segregation of the Cleveland public schools. *Reed* v. *Rhodes*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*. ..... U.S. ....., 48 U.S.L.W. 3600 (March 17, 1980 (No. 79-804). Accordingly, additional hearings were held from April 21 to April 24, 1980 on the issue of whether the State defendants violated the plaintiffs' Fourteenth Amendment right to equal protection of the laws.

I.

In 1976, this Court found both the Cleveland Board of Education, its members, and Superintendent ("Cleveland defendants") and the State Board of Education, its members and Superintendent ("state defendants") liable for intentionally and deliberately operating a racially dual public school system in the City of Cleveland. 422 F. Supp. 708 (N.D. Ohio 1976). This determination of liability was appealed to the Court of Appeals for the Sixth Circuit,

which remanded the case back to this Court for further consideration in light of the intervening Supreme Court decision of *Dayton Board of Education* v. *Brinkman, (Dayton I)*, 433 U.S. 406 (1977). 559 F. 2d 1220 (6th Cir. 1977).

Upon reconsideration, the original findings were carefully reviewed, affirmed and readopted, 455 F. Supp. 546 (N.D. Ohio 1978) and a Remedial Order was issued. 455 F. Supp. 569 (N.D. Ohio 1978). The state defendants again appealed from both the Remand and Remedial Orders.

In its August 23, 1979 decision, the Court of Appeals affirmed this Court's findings of intentional systemwide segregation with respect to the Cleveland defendants. *Reed* v. *Rhodes*, 607 F.2d 714 (6th Cir. 1979), *aff'g in relevant part*, 422 F. Supp. 708 (N.D. Ohio 1976), *cert. denied*, ... U.S. ....., 48 U.S.L.W. 3600 (March 17, 1980) (No. 79-804). However, with regard to the liability of the state defendants, the Sixth Circuit Court of Appeals wrote:

> While in some respects the findings of segregative purpose on the part of the state serve to meet the Dayton requirements, [*Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977)], Dayton appears to us to negate a state liability finding entered principally on the ground of failure of the state to compel its subdivision to comply with the United States Constitution. As we have indicated in the Columbus opinion, [*Penick* v. *Columbus Board of Education*, 583 F.2d 787 (6th Cir. 1978), *aff'd* 443 U.S. 449 (1979)], knowledge by the state of intentional segregative practices on the part of the local board and intentional support of the local board in pursuing such practices appear to be requirements for a finding of constitutional violation. For these reasons, the question of state board liability is again remanded to the District Court for answers to the questions posed in *Penick* v. *Columbus Board of Education*.

607 F.2d at 718.

In *Penick* v. *Columbus Board of Education*, 583 F.2d 787 (6th Cir. 1978), *aff'd* 443 U.S. 449 (1979), the Court of Appeals developed the following guidelines to determine the question of state liability:

> 1) The State Board's knowledge (if any) of the Columbus Board's intentional segregative practices, 2) the State Board's failure to protest or restrain them by withholding funds, 3) the State Board's continuance of support in the face of such knowledge, 4) the motivation of the State Board in failing to investigate the reasons for de facto segregation, and 5) the effect of findings if any, under 1, 2, 3 and 4 above, as suggested in [*Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977)].

583. F.2d at 818.

II.

Racial Segregation in Ohio Public Schools

During the past decade, numerous courts have determined that local offices of Ohio public school districts engaged in intentional segregative practices in violation of the Fourteenth Amendment. *See e.g., Reed* v. *Rhodes*, 422 F. Supp. 708 (N.D. Ohio 1976), *aff'd* 607 F.2d 714 (6th Cir. 1979), *cert. denied*, ... U.S. ....., 48 U.S. L.W. 3600 (March 17, 1980) (No. 79-804); *Penick* v. *Columbus Board of Education*, 429 F.Supp. 229 (S.D. Ohio, 1977), *aff'd in relevant part*, 433 U.S. 449 (1979); *Brinkman* v. *Gilligan*, 583 F.2d 243 (6th Cir. 1978), *aff'd*, 443 U.S. 526 (1979). However, this intentional racial segregation in Ohio public schools is not a new phenomenon. It has deep historical roots in the laws and traditions of the State of Ohio which for many years treated blacks as inferior beings and second-class citizens. Recounting this history does not make pleasant reading but is critical to developing a proper understanding of the State's involvement in segregation. A brief summary will suffice.

Throughout the nineteenth century, the constitutions and laws of the State of Ohio were used to "regulate black and mulatto persons." 29 Stat. 439 (*See* Plaintiffs' Exhibit 3). Blacks were denied the right to vote, Const. of 1802, art. IV, § 1, Const. of 1841, art. V, § 1, the opportunity to serve on juries, Laws of Ohio 26:43, 29:43, the ability to gain a legal settlement, Laws of Ohio 27:35 and the ability to testify in any court proceeding involving a white. *See, e.g. Gray* v. *The State,* 4 Ohio Rep. 353 (1831). The laws also placed restrictions on the right of a "Negro or mulatto person" to "emigrate or settle within this state," 29 Stat. 439, and established criminal and civil penalties designed to secure the right of slave owners in slaveholding states to recover slaves who escaped to Ohio. 37 Stat. 38. State law also was used to "prevent the amalgamation of the white and colored races" by declaring it unlawful "for any person of pure white blood to intermarry . . . with any . . . person having a distinct and visible mixture of African blood." Laws of Ohio 58:6.

On remand, the plaintiffs' basic position is that the state defendants possessed substantial information regarding the existence of intentional segregation in the Cleveland public school district. Despite this information, they structured and operated the State Board of Education and the Department of Education in a manner which permitted them to fail to act upon this relevant and extensive information regarding the existence of dual educational systems in Cleveland and other municipalities in Ohio. The plaintiffs claim that such structuring and operation cannot serve to immunize the state defendants from liability solely because of the resulting lack of knowledge of segregative practices. The plaintiffs also contend that the information of intentional racial segregation in the possession of the state defendants is so overwhelming that knowledge can be imputed.

The plaintiffs are joined by the Cleveland defendants and the Department of Justice appearing as *amicus,* who

argue that the state defendants had substantial knowledge of intentional segregative acts in the Cleveland public school district. Given this knowledge, the state defendants unlawfully and deliberately failed to enforce the State of Ohio's anti-segregation laws and supported intentional racial segregation in Cleveland.

The state defendants defend their actions by stressing the distinction between *de jure* and *de facto* segregation. They admit an awareness of racially unbalanced schools within Cleveland and large urban areas in Ohio. However, because such imbalances were considered *de facto* and therefore not violative of the Constitution, there was no obligation to investigate or take corrective action. The State defendants also claim that they possessed no knowledge of the Cleveland defendants' *de jure* practices, and defend their administration and procedures in the desegregation area.

Racial discrimination in the area of public education also was authorized by state law. The foundations for the public school system were established in 1821, Laws of Ohio 19:5, but black children were totally excluded from public education until 1848. (*See* Plaintiffs' Exhibit 1; 2). The early history of public education in Ohio was summarized by the Ohio Supreme Court in *Van Camp* v. *Board of Education of Logan,* 9 Ohio St. 406 (1859):

> Prior to 1848 there was not any legislative provision in Ohio for the education of any but the white youth resident in the various districts. Most of the previous statutes – and they are quite numerous – merely make provision for the instruction of the white youth, and exempt the property of blacks and mullatoes from taxation for school purposes, while some, like the act of February 10, 1829, [Laws of Ohio 27:72] in express terms, exclude blacks and mulattoes from the schools.

9 Ohio St. at 408-409.

It was not until 1848 that the State of Ohio passed legislation to provide public education for children of black

residents. 2 Curwen Rev. Stat. 1428 (Plaintiffs' Exhibit 4). Shortly thereafter, a law "conceived in a more liberal and patriotic spirit", *Van Camp* v. *Board of Education of Logan, supra* at 409, was enacted which required local boards of education "to establish within their respective jurisdictions, one or more separate schools for colored children." Act of 1853, Section 31 (Plaintiffs' Exhibit 8). While blacks were permitted to receive an equal per capita distribution of the common school fund, laws were passed designed to ensure that "colored" pupils were educated at separate schools. (Plaintiffs' Exhibit 6). This was done in Cleveland with the establishment of the Cleveland School District and the enactment of a law authorizing the Cleveland Board of Education "to provide separate schools for the colored youth of school who are residing in said City, apart from other schools." (Plaintiffs' Exhibit 10A).

The deplorable state of race relations was described succinctly by the Supreme Court of Ohio in its 1859 *Van Camp* decision: "For nearly two generations, blacks and mulattoes had been a proscribed and degraded race in Ohio." 9 Ohio St. at 410. "Long years of hostile legislation and social exclusion" had resulted in racial apartheid, and "the prejudice of ages could not be dissipated by one or more judicial decisions" *Id.* at 410-411. Indeed, this prejudice was often reflected in judicial opinions such as *State ex rel. Gaines* v. *McCann*, 21 Ohio St. 198 (1871), in which the Supreme Court of Ohio unanimously upheld the validity of legislation which mandated racial segregation.

In 1887, following the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States, the Ohio Legislature repealed the State's "Black Laws", including the provisions of the separate school act. Act of February 21, 1887, 84 Ohio Laws 34. However, while the Supreme Court of Ohio interpreted the legislation to mean that "separate schools for blacks have been abolished," *Board of Education* v. *State*,

45 Ohio St. 555, 556 (1888), previously established separate schools and separate school districts for black children were not abolished, nor was racially integrated education declared to be a policy of the State.

Despite the official repeal of the "Black laws" in 1887, there is no evidence that the State of Ohio undertook actions during the next fifty years to dismantle the separate schools. Rather, the record reveals that racially segregated public school education continued unabated. For example, Columbus school officials created a separate school for blacks in 1909, and staffed it entirely with black teachers. *Penick* v. *Columbus Board of Education, supra,* 429 F. Supp. 229. A black plaintiff's attempt to challenge this intentional segregative conduct was rejected by Ohio Courts. *Id.* In addition, Dayton public school officials began segregating students by race as early as 1912. *Brinkman v. Gilligan, supra,* 583 F.2d at 249.

Throughout the early 1900's, officials of the State of Ohio were aware that separate schools for black children were maintained in numerous localities. This is reflected in biennial reports submitted to the Governor of Ohio by the Ohio Director of Education (the predecessor of the current office of Superintendent of Public Instruction) from 1929 to 1941. (Plaintiffs' Exhibits 21-25 and Defendants' Exhibits 1-6). These reports contained the separate enrollment figures for blacks and whites. Significantly, the 1929-31 report expressly noted that "the enrollment in special schools for colored children was 1,269 for Columbus and 1,318 for Cleveland". (Plaintiffs' Exhibit 21). The separate schools were operated in Cleveland despite complaints by black parents and leaders. Two separate special school for black children – Longwood and Outhwaite – were justified by the Cleveland Board of Education on the ground that their purpose was to urbanize black children moving to Cleveland from southern states. (Plaintiffs Exhibit [Liability] 224.) In fact, enrollment figures revealed

that most of the children attending these schools were natives of Cleveland. (*Id.*)

Reports in subsequent years to the Governor and General Assembly demonstrate that separate schools were maintained in some municipalities. The 1933-35 report stated that "Ohio generally does not have separate schools for colored children. A few cities maintain separate schools for colored pupils." (Defendants Exhibit 3). The 1935-37 report noted that "a few cities have separate schools for colored children in certain sections where the population is entirely colored." (Defendants' Exhibit 4). The 1937-39 report stated that "Ohio does not have many separate schools for colored children (Plaintiffs' Exhibit 24). Finally, the 1939-41 report (Plaintiffs' Exhibit 25) contained the following statement:

> *Colored Teachers.* Ohio has very few separate schools for colored children. Ten cities reported the existence of separate schools for colored children. These schools are located in centers where the population is mostly comprised of colored people. The following cities reported separate schools – Cincinnati, Chillicothe, Columbus, Dayton, Gallipolis, Lockland, Mansfield, (classes only), Middletown, Portsmouth, Wilmington, and Xenia. Cincinnati and Columbus have a separate Junior High School for children in one locality, as well as elementary schools for colored children.

Despite repeated denials by the state defendants, the evidence shows that between 1940 and 1954 annual statistical reports were submitted to the State Superintendent of Public Instruction containing data on the racial composition of students and faculty in school districts throughout the state. (Plaintiffs' Exhibit 26). These reports asked local school districts to report the "Number of Separate Schools for Negroes," or "Number of Separate Schools for Colored Children". The State Department of Education also required principals to submit annual statistical reports which included information about the number of colored

teachers and pupils in each principal's school, and required district superintendents to submit annual statistical reports which included information about "colored" teachers and pupils, and about separate schools for "colored" children (see Plaintiffs' Exhibit 33-39). Finally, the Department also required teachers to submit annual reports reflecting the number of colored children enrolled in their classes. (Plaintiffs' Exhibit 27).

The reports submitted between 1940 and 1953 indicate that at least twenty-six local school districts reported the existence of separate schools for black children. (*Id.*) At least forty-four separate school were reported by these local school districts: forty elementary schools; two junior high schools, one senior high school, and one special school. (*Id.*) Those local school districts which reported the existence of separate schools – Dayton, Columbus, Hillsboro – were subsequently found to be operating unconstitutionally segregated school systems. *See Clemons* v. *Board of Education of Hillsboro,* 288 F.2d 853 (6th Cir. 1956); *Brinkman* v. *Gilligan, supra; Penick* v. *Columbus Board of Education, supra.*

The information submitted to the State Department of Education clearly establishes that separate schools existed in Ohio long after such schools had been formally abolished by law. Prior to 1954, the record shows no effort by the State of Ohio to enforce the 1887 law which abolished separate schools for blacks. Rather such schools, initially created by state law and enforced by state courts, were maintained by the policies, practices, and customs of local officials and with the knowledge of state officials.

III.

A. Policies and Procedures of the State Defendants in Desegregation Matters in the years following Brown v. Board of Education.

The decision of the Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), was handed down at a time when the state educational structure was undergoing legislative change. In 1953, amendments to the Ohio Constitution provided for the selection of a State Board of Education and the appointment of a Superintendent of Public Instruction, with powers and duties prescribed by law. Ohio Const., art. VI, § 4. The Office of Superintendent of Public Instruction had been in existence under various titles since 1853 (Plaintiffs' Exhibit 19). Similarly, the State Department of Education, the administrative organization of the Superintendent and one of fifteen executive departments of the state government, had been in existence for numerous years. (*Id.*)

In order to comply with the State Constitutional mandate, the General Assembly enacted legislation specifying that the State Board of Education be comprised of twenty-three members, one from each of the congressional districts in the state. O.R.C. § 3301.04. The new State Board was given the authority to continue to employ all persons who had been in the Department of Education, and that authority was expressed by resolution. *Id.* (Plaintiffs' Exhibit 31).

During the 1930's and 1940's, the State of Ohio was aware that separate schools for blacks existed in numerous local school districts, including Cleveland, (Plaintiffs' Exhibits 21-26). The suggestion that the separate schools reported in the tables refer to "neighborhood schools" finds no support in the record and flies in the face of subsequent findings of other courts that separate schools did, in fact, exist. *See, eg. Clemons* v. *Board of Education of Hillsboro, supra; Brinkman* v. *Gilligan, supra; Penick* v. *Columbus Board of Education, supra.* Thus from creation of the new organizational structure in 1954, the State Department of Education was staffed by persons who possessed knowledge of the existence of separate schools for blacks and had permitted such schools to be maintained.

From its inception, the State Board of Education showed no inclination to undertake affirmative actions to eliminate segregated school districts. During the first meeting of the new State Board on January 3, 1956, Mr. Charles Lucas, the Board's sole black member and a realtor from Cleveland, moved that the Board withhold state funds from any school district that practiced racial discrimination. The motion was defeated. On March 12, 1956, Mr. Lucas proposed that the State Board

> "establish a committee of its own or its designees to obtain its own set of facts that segregated schools exist in the State of Ohio. Perhaps we don't have jurisdiction in this matter. I should like to ask that we request the Attorney General to define whether or not we have any authority in this field."

(Plaintiffs' Exhibit 29).

This dual motion was defeated and in its stead the State Board declared, over Lucas' dissent, the policy it was to follow during the next two decades.

> WHEREAS the determination of what constitutes unlawful segregation is a matter for judicial decision, and
>
> WHEREAS the State Board of Education has neither the means nor the right to take action on this question without final determination by the courts,
>
> BE IT RESOLVED THAT in any case where courts have made final determination that unlawful segregation exists, this Board would then take action in accordance with the law.

(Plaintiffs' Exhibit 29).

Mr. Lucas continued to press for a broader and more affirmative declaration of policy in the area of racial segregation. In May 1956, Mr. Lucas proposed another resolution as follows:

WHEREAS: The Supreme Court of the United States has clearly defined racial segregation in the public schools as unconstitutional, and

WHEREAS: The Supreme Court of the State of Ohio has ruled racial segregation in the public schools unconstitutional, and

WHEREAS: Remnants of racially segregated schools exist in Ohio, and

WHEREAS: The Ohio State Board of Education is specifically authorized in House Bill #212 to administer the schools within the framework of existing law, and to regulate the admissions of pupils and to set up the highest possible educational standards for the public schools of Ohio,

BE IT RESOLVED: that the Ohio State Board of Education go on record as insisting that each public school under its jurisdiction operate within State and Federal laws requiring equality of treatment of all pupils, regardless of race, creed, or color under penalty of loss of state funds.

BE IT FURTHER RESOLVED: that the Ohio State Board of Education, on and after September, 1956 will instruct the State Controlling Board to withhold funds from any school district which operates a racially segregated school in defiance of the public policy of the State of Ohio, the Ohio Supreme Court and the Supreme Court of the United States.

(Defendants' Exhibit [Trial] 2012)

During discussions concerning the resolution, Mr. Lucas declined to name any district practicing segregation, even though he believed that segregated school systems still existed in Ohio. *(Id)*. The proposed resolution was defeated, partly on the ground that Mr. Lucas had presented no proof that "remnants of racially segregated schools exist in Ohio."

Mr. Lucas' continued effort to push for stronger affirmative action from the State Board was opposed by other

board members, who petitioned him to "abort the effort". (T. Tr. 2271). A compromise was reached in which an opinion of the Attorney General was sought with respect to four questions concerning the scope of the State Board's authority. (Defendants' Exhibit [Trial] 2012, p. 4.).

On July 9, 1956, the Attorney General issued the following opinion in response to the State Board's request.

> .. The term 'law' as used in section 3317.14, Revised Code, forbidding the distribution of state funds to school districts which have not 'conformed with the law,' is used in the abstract sense and embraces the aggregate of all those rules and principles enforced and sanctioned by the governing power in the community. Such term embraces the equal protection provision in the Fourteenth Amendment of the Constitution of the United States under which *the segregation of pupils in schools according to race is forbidden.*
>
> 2. The *primary responsibility for administering the laws* relating to the distribution of state and federal funds to the several public school districts *is placed with the state board of education,* subject to the approval of the state controlling board.
>
> 3. *It is the responsibility of the state board of education in the first instance to determine whether a particular school district, or the board of education of such district, 'has not conformed with the law' so as to require the withholding of state funds from such district.* In making such determination the state board of education should observe the requirements of the Administrative Procedure Act, Chapter 119, Revised Code, as to notice, hearing, summoning of witnesses, presentation of evidence, degree of proof, and procedural matters generally.
>
> 4. Following a determination by the state board of education that a school district 'has not conformed with the law' so as to require the withholding of state funds as provided in Section 3317.14, Revised Code, such board and the controlling board, acting sepa-

> rately, may, for 'good and sufficient reason' established to the satisfaction of each board, offer a distribution of funds to such district notwithstanding such lack of conformity with the law.

(Plaintiffs' Exhibit [Trial] 383) (emphasis added).

The Attorney General's opinion also specified the State Board's obligations in the area of racial segregation.

> "It follows, therefore, that *in those cases in which your board finds as a matter of fact that racial segregation exists* in a particular school district, the restrictive provisions of section 3317.14, Revised Code, *must* be deemed to apply.

(*Id.*) (emphasis added)

Despite knowledge of its "affirmative duty under both Ohio and Federal laws to take all actions necessary to prevent and eliminate racial segregation in public schools," *Brinkman v. Gilligan*, 503 F.2d 684, 704 (6th Cir. 1974), the State Board deliberately chose to follow procedures which enabled it to evade its lawful responsibilities.

Both the State Board and Department of Education operated on the assumption that local school districts carried out their responsibilities in accordance with law. (Tr. 490-492) The assumption was that local school administrators were knowledgeable concerning their duties under the United States Constitution and laws of the State, and that statements submitted to the department which indicated full compliance with all laws were essentially accurate. (*Id.*) The State defendants argue that this assumption was reasonable because it was based on personal relationships between state and local school officials extending over a period of time, audits conducted by the State Auditor which rarely revealed that schools were operated unlawfully, efforts of local district administrators to be in compliance with the State Board's minimum standards, and local school assurances upon application

for federal funds that such funds shall not be used in a racially discriminatory manner. (Tr. 528-529, 547-552).

In order to challenge the continuing assumption of legality in a particular school district, a complaint had to be filed regarding a policy or practice in the district that appeared to be in violation of law. (Tr. 629). The position of the State Board was that it would take no action against a school district unless a complaint was filed in which the complainant produced significant evidence of a violation of a state or federal law (Tr. 481-482, 499), or complained of a practice already determined by a court to constitute illegal or unconstitutional action. (Tr. 781-782).

Absent such a complaint, neither the State Board nor Department of Education permitted an investigation to be conducted into whether state or federal laws were being violated by the illegal segregation of school children. (Tr. 547).

A "concern" or a "request for information" as opposed to a "complaint", addressed to the State Board was handled informally by giving information to the interested parties. Statements or comments which did not provide information, evidence, statistical analysis or language sufficient to prove a *prima facie* case of *de jure* segregation were relegated to the status of "concerns" or "requests for information." (Plaintiffs' exhibit 30, *see pp.* 25-26 [App. 81-82]). Nor was the complaint procedure ever publicized by press release or administrative rule. Consequently, there was never any public awareness of the mechanism for filing a complaint. The determination of whether to characterize a submission or presentation as a "complaint" or merely as a "concern" or "request for information" rested in the uncontrolled discretion of the State Superintendent for Public Instruction. (Tr. 590).

Given the history and scope of racial segregation in Ohio, the assumptions and procedures employed by the State defendants were clearly insufficient to carry out the

affirmative duties imposed by federal and state law. The core assumption of legality clearly was unreasonable in the area of race, where statistical data prepared by the State defendants indicated the existence of separate schools sixty years after the State of Ohio had officially abolished them. The elimination of data on race between 1954 and 1968 did not eradicate the pre-1954 knowledge of illegality and render the assumption valid. The fact that state audits suggested general compliance with laws in no way bolsters the assumption of legality. No evidence was presented that the audits ever addressed the use of funds for segregative purposes. Rather the evidence suggests that the state audits covered the more traditional areas of construction, salaries, supplies, etc. Similarly, the State Board's reliance on assurances provided by local districts in order to receive federal funds was unjustified. Many of these same local districts knowingly had unlawfully operated separate schools for black children in the post-Black laws era, and could not reasonably be expected to monitor themselves.

The complaint procedure also was structured in such a manner that complaints would either not be filed or would not be acted upon. The State Board never established a written complaint policy or procedure (Tr. 589, 637). On at least one occasion, persons who believed they had made a "complaint" regarding racial segregation in Cleveland discovered that their complaint had been treated as a "request for information." *See pp.* 25-26 [App. 81-82] *infra.*

The effectiveness of the State Board's complaint procedure was limited because the Board never publicized its "primary responsibility" under the 1956 Attorney General's opinion to determine "in the first instance" whether a particular school district had not conformed with the law, nor did the Board ever hold a formal session outside of Columbus. Even if the State Board had attempted to

inform the public of the time and location of its meetings (Tr. 158-159, 580-581), the failure to publicize its responsibility in matters of school segregation and the manner of handling such "complaints" insured that few complaints of racial segregation came before the Board. The evidence indicates that while the complaint procedure was allegedly designed to permit open discussion (Tr. 740), members of the State Board (Tr. 321) and Department of Education (Tr. 321-324) discouraged individuals making oral presentations from naming names or specifics in order to avoid embarrassing individuals in the local district.

Operating under an unwarranted assumption of legality in racial matters and a complaint procedure not structured to uncover instances of racial segregation, it is not surprising that few "complaints" were ever brought before the State Board. The North College Hill complaint, filed in 1964 and claiming blatantly illegal segregation of black elementary school children in separate buildings (T.Tr 3586) represented the sole instance where the State Board ordered an investigation and corrective action. (State Defendants' Exhibit II). An earlier 1963 complaint attacking the use of "intact busing" in Cincinnati had resulted in the State Board is [SIC] deferring action until the complainants had obtained a judgment from a court that segregation existed. (Plaintiffs' Exhibit 41). This State Board inaction occurred even though former State Superintendent Essex identified "intact busing", a procedure which isolated an entire class of one race from the rest of the students in a receiving school of the opposite race, as an obvious example of illegal *de jure* segregation which deserved immediate attention and action by the State Board.

The State Board and Department of Education claim that no one had ever lodged a "complaint" with them suggesting that illegal segregation existed in the Cleveland public school district. (Tr. 277; T.Tr. 3582-3584) Consequently, under established policy, no investigation and

determination of facts was made about the existence of intentional segregation in Cleveland. The Court finds the position of the State defendants unsupportable for two reasons. First, under procedures employed by the State Department of Education, the filing of a "complaint" has never been a pre-requisite to administrative investigations and the utilization of corrective actions. Second, evidence presented during both the initial liability trial and the remand hearings demonstrates that the State defendants were made aware of the existence of significant problems of intentional segregation in the Cleveland area but deliberately and consciously chose not to pursue any investigation.

In defending their conduct regarding the Cleveland school system, the state defendants repeatedly have told this Court that no formal "complaint" has ever been made to them regarding segregation in Cleveland. However, in defending their conduct in general in the area of race, the State defendants stress the fact that on numerous occasions actions have been taken to eliminate segregative practices in local districts absent the lodging of a complaint. This is claimed to have occurred in Middletown, in Dayton, and in Toledo. (T.Tr. 5842-5843, 3956-3957, 3955-3956) In addition, the defendants claim they have denied transfer applications in Newburg Heights (T.Tr. 3925), Youngstown (T.Tr. 3926-3927), and Springfield. (*Id.*) in order to prevent increased racial isolation and have brought about the consolidation of school districts which have had an integrative effect. (T.Tr. 3928-3934).

In explaining the procedure whereby the State Department of Education determined to act administratively, former State Superintendent Essex noted that the Department first had to learn of the alleged violation of law by a protest of some kind. (T.Tr. 3953-3954). This protest might take the form of telephone calls, letters, petitions, delegations, and H.E.W. compliance discussions. (*Id.*). After

the department learned of "a complaint or protest or an indication of some kind that somebody is unhappy about something and that there is a possible violation of law" (*Id.*), former Superintendent Essex stated that the Department "*may* send a person or group of persons to take a look. I *may* pick up the phone and talk with the [local] Superintendent and ask him for the facts." (*Id.*)

The significance of the availability and use of informal administrative mechanisms is threefold. First, it contradicts the position taken by the State defendants during the remand hearings that the absence of a "complaint" prevented them from investigating school segregation in Cleveland. Second, it indicates that information of unlawful conditions could be and actually was made available to the State Department of Education by means other than "formal" complaints. Third, it suggests the highly discretionary nature by which administrative process was used to deal with problems of racial segregation in Ohio public schools.

The designs and operation of the procedures for triggering an investigation prevented highly relevant and necessary information from ever reaching the State Board of Education. Despite this attempt to shelter the state defendants from information regarding segregative practices the record reveals convincingly that on numerous occasions such information was in the possession of the defendants. *See* pp. 20-27 [App. 75-84] *infra*. However, on those occasions, the state defendants chose not to pursue any meaningful inquiries to ascertain the existence of such practices, opting instead for a policy of calculated ignorance, and therefore, inaction.

B. Policies and Procedures of the State Defendants in Non-Desegregation Matters.

The conduct of the state defendants in the area of desegregation varies substantially from their conduct in

other areas. Except for duties concerning desegregation, the defendants vigorously exercised the full scope of their powers in fulfilling their obligations. This is evidenced most clearly in the promulgation of minimum standards for all public schools in Ohio to insure uniform high quality of education.

It is the obligation and statutory duty of the State Board of Education to formulate and prescribe minimum standards for all elementary and high schools in Ohio "for the purpose of requiring a general education of high quality" for all of the pupils within the State. The State Board is additionally required to exercise leadership in the "improvement" of public education in Ohio, and toward that goal the legislature has suggested that the required minimum standards be established in a broad spectrum of areas, and has been very careful not to confine the possible areas to only those suggested in the legislation. The areas suggested include, but are not limited to, the certification of teachers; curriculum and materials; buildings and their contents; admission, assignment, promotion and graduation of pupils; and "such other factors as the board finds necessary." O.R.C. §§ 3301.07(B) and 3301.07(D). As this Court has previously noted, the State defendants admitted that, although having the power to do so, they never promulgated minimum standards regarding racial segregation of pupils, faculty, staff, or use of facilities. 455 F.Supp. at 557.

Through its chartering powers, the State Board and Department have aggressively enforced minimum standards. As part of the chartering process, actual on-site inspections of secondary schools are conducted every three to five years. This inspection includes the physical examination of the faculty and conversations with faculty and administrators. Prior to the opening of a new school, an evaluation is made and a report sent to the State Department containing information of expected pupil and faculty populations, including the racial composition of

each. This inspection process is ongoing and provides the State defendants with visual and statistical knowledge of the composition and racial makeup of pupil and teacher populations. (T.Tr. 2348, 2351-2354). If a local school district does not meet the minimum standards promulgated by the State Board, the Board may revoke the district's charter or withhold funds from the district. The State Board is also empowered, upon revocation of a school's charter, to "dissolve the school district and transfer its territory to one or more adjacent districts." O.R.C. § 3301.16.[1] Thus, had the State Board not ignored the racial segregation rampant in the Cleveland school system, it could, quite properly, have dissolved the district and transferred its territory to adjacent districts, whereby a fully integrated metropolitan school system could have been realized. The State's failure to act left the Cleveland school system racially isolated.

The State Board of Education has vigorously exercised its chartering powers. Between 1955 and 1974, the number of state-chartered school districts in Ohio has diminished from over 1265 to 617. This reduction has been the result of various State Board actions, including: the vigorous use of powers to revoke charters for non-compliance with promulgated minimum standards, the use of powers to force the voluntary abandonment of charters after confrontation over compliance with minimum standards, and the consolidation of two or more districts, often after a determination that one of the districts is not complying with minimum standards. (Tr. 2309-2323 [Trial]).

In addition to exercising powers relating to minimum standards, the State Board also has successfully urged enactment of legislation in the education area. This has

---

[1]Qualified electors in the district to be transferred, equal in number to a majority of the qualified electors voting in the last general election, may file a petition of referendum against the transfer. O.R.C. § 3301.161.

been accomplished by the statutory power to recommend legislation to the Governor and the General Assembly in areas identified as of public or state interest in the field of education. O.R.C. § 3301.07(P). Legislation recommended by the State Board has been enacted in the areas of vocational education, teachers education and certification, funding for disadvantaged pupil programs, etc. (T.Tr. 2388, 3939-3950).

The State Board of Educations' [SIC] powers are not limited to establishing minimum standards and recommending legislation. It also has the statutory power to administer and supervise all allocations and distributions of state and federal funds for public school education. O.R.C. § 3301.07(c).

C. Use of Traditional Powers in Desegregation Matters

Since 1956, the state defendants have been aware of their obligation under the Constitution, *see Cooper* v. *Aaron*, 358 U.S. 1 (1958), and State law, *see* Attorney General's Opinion, (Plaintiffs' Exhibit 383 [Trial]) to insure that state monies were not being used to segregate school children illegally. The State defendants' duty in the area of desegregation also arose with Title VI of the Civil Rights Act, 42 U.S.C. § 2000d et seq. (1974), which was enacted in 1964 and which prohibited racial discrimination in any program receiving federal funds. To receive funds under Title VI, a local school district is required to report fully to the State Board and Superintendent concerning affirmative action and equal opportunity plans, and to indicate compliance in all matters. The State Department of Education is responsible for investigating these statements on behalf of the appropriate federal agency. O.R.C. § 3301.07(c); 45 C.F.R. § 80.4(b)(2),(T.Tr. 2300-2307).

Despite possessing the legal authority and powers to address fully the existence of racial segregation in Ohio public schools, the state defendants deliberately chose not to exercise such authority and power to carry out their

affirmative duty. They were able to continue approving charters for the Cleveland public school system by not imposing and enforcing minimum standards dealing with desegregation. In the process, they approved the chartering of twenty-seven new schools in Cleveland, each of which was opened in a deliberately segregated manner as previously found by this Court. 455 F. Supp 546, 561.

In the area of recommending legislation, it is noteworthy that the State Board never once proposed or endorsed legislation designed to decrease racial violation or eliminate segregative practices. This omission is glaring when compared to the State Board's involvement in recommending other legislation (e.g. lunch programs).

Finally, in the area of state and federal funding, the record shows no meaningful effort by the State Board to comply with the obligations imposed by the Constitution, federal statute and state law. For example, between 1964 and 1968, the State Board simply assumed that districts receiving federal funds were complying with Title VI of the Civil Rights Act. (Tr. 548-549). And since 1968, the State Board has relied on audits conducted by the State Auditor, even though these audits were not structured to determine the existence of discrimination in the operation of programs. (Tr. 351). The "enforcement" obligation of the State defendants has been conceived of as requiring simply desegregation assistance to local communities. Thus the State Board or Department conducts seminars and conferences and undertakes other efforts designed "to create an awareness that may not have existed with regard to the statutes." (Tr. 545).

III.

A. State Defendants' Knowledge of Intentional Segregative Practices in the Cleveland Public School District.

The state defendants' policies and procedures which limit their access to information of specific segregative

practices were incapable of providing total insulation from extensive evidence from various sources indicating the existence of intentional segregative practices in the Cleveland public school district. The scope of the unconstitutional conditions and the thousands of people affected insured that some information trickled through to the defendants. However, even when confronted with such information, the State defendants preferred a condition of ignorance and failed to take appropriate steps to investigate and correct the problems.

The Court finds that the State defendants either (1) had knowledge of the existence of substantial intentional segregative practices by the Cleveland defendants, or (2) were confronted with information of such magnitude that such knowledge could be imputed to them; and that their failure to investigate and to correct the violations was intentionally supportive of such practices.

This finding is based on the following:

1) As early as 1930, the State defendants were aware that the Cleveland Board of Education was operating special schools for significant numbers of black children. (Plaintiffs' Exhibit 21). These separate schools were being maintained long after the General Assembly and Supreme Court of Ohio had declared separate schools to be abolished.

2) In the late 1950's the State defendants granted a waiver to the Cleveland Board of Education from compliance with minimum hour-per-day standards. This permitted the Cleveland defendants to provide less than the required daily hours of education to students in overcrowded schools, the great majority of whom were black. This Court has previously found this action to be an intentional segregative act on the part of both the State and Cleveland defendants. 422 F. Supp. 708, 793; 455 F. Supp. 546, 565 (remand opinion).

The state defendants repeatedly have contended that they never were advised of the number or identity of the schools, or the race of the pupils involved. However, evidence now indicates that the State defendants did request the "names of schools and grade levels" to be affected (Plaintiffs' Exhibit 28) and no evidence suggests that this evidence was not produced. Moreover, at all times the State Department of Education had access to relevant data regarding the schools to which waivers were granted.

3) In 1967, a report on "Racial Isolation in the Cleveland Public Schools" was prepared by Dr. Willard Richan of Case Western Reserve for the United States Commission of Civil Rights. (Plaintiffs' Exhibit 224 [Trial]). This report detailed certain intentionally segregative acts performed by the Cleveland Board of Education. (Tr. 225). Unbelievably, the State defendants claim they were never aware of such a study until the original liability trial in 1976. (Tr. 223-224). However, evidence indicates that this study was mentioned in a public presentation to the State Board of Education on racial problems in the Cleveland public schools in April 1970. (Plaintiffs' Exhibit 46). Specifically, the question was posed to the State Board: "Do you make use, for example, of U.S. Civil Rights Commission findings on policies of the Cleveland School System?" (*Id.* at 2). The fact that no copy was requested and no questions were asked regarding the findings cannot shelter the state defendants from knowledge of the existence of the report. This represents another example of highly relevant information concerning segregation made available but not pursued by the state defendants.

4) In 1970, racial tension in the Collinwood area of Cleveland in Collinwood High School reached a point where the Cleveland Police were no longer able to control the violence and the National Guard had to be alerted and stationed in the area. (Tr. 311-314, 442 Plaintiffs' Ex-

hibit 47; 48). The adamant refusal of the Cleveland Board of Education to reassign black students from overcrowded, all-black Glenville High School to adjacent, underutilized and predominantly white Collinwood High School contributed to this tension. (Tr. 3945-396 Plaintiffs' Exhibit 60).

The racial problems confronting the Collinwood and Glenville High Schools in Cleveland prompted concerned parents to seek assistance from the federal government. On April 10, 1970, a letter was sent to civil rights specialist Leonard Hamilton of the Department of Health, Education and Welfare by the Glenville Task Force on Education and the Collinwood Committee of Black Concern. (Plaintiffs' Exhibit 55). That letter requested the withholding of federal funds from the Cleveland Board of Education because of various segregative practices, including: discriminatory gerrymandering of the Collinwood High School district; discriminatory transfers of black students out of Collinwood High School; disproportionate black faculty; and overcrowding of all-black Glenville High School resulting in inferior facilities and education. (*Id.*). It stated that members of the community would "be pleased to present evidence to support our claims of discriminatory practices in the Cleveland schools." (*Id.*)

A copy of this letter calling "for an investigation of discriminatory practices in the Cleveland School System" was sent by Mrs. Gaines to Robert Greer, Assistant Superintendent of Urban Education, on April 27, 1970. (Plaintiffs' Exhibit 56). Despite receipt of this letter detailing specific claims of segregative practices, the State defendants undertook no investigative or corrective actions. The State Superintendent was "not really sure of what happened with HEW" (Tr. 570) and claims that he was not informed of the contents of the HEW letter (Tr. 572).

Fortunately, the Department of Health, Education and Welfare did undertake to investigate the complaint

of the Collinwood and Glenville parent groups. Its investigation revealed that

> (1) Some education services provided to students at Glenville are not equal to those provided at Collinwood, (2) pupil assignment and boundary practices have created an overcrowded school at Glenville and an underutilized school at Collinwood."

HEW's report concluded that "[t]he comparison between Glenville High School, 100 percent minority, and Collinwood High, 30 percent minority, indicates that an unequal situation exists between the two schools," in eight areas, including equipment, library facilities, vocational course offerings, counselling, special education, and faculty assignments.

(Plaintiffs' Exhibit 62).

The evidence presented with regard to the HEW letter and finding indicates that Assistant Superintendent Greer did have knowledge of substantial claims of segregation in the Cleveland public schools. However, consistent with a policy of calculated ignorance and inaction, no investigation was ever conducted.

5) Parental concern over the situation at Collinwood and Glenville High Schools did not end with a letter being sent to the Department of Health, Education and Welfare. Fortuitously, two concerned parents, Mr. Rufus Pierce and Mrs. Edith Gaines, were informed by Mildred Madison, a newly elected black member of the State Board of Education from Cleveland, that they could appear before the State Board of Education. (Tr. 315-317, 398). Mr. Pierce and Mrs. Gaines told Mrs. Madison that they wished to complain about deliberately segregative student and faculty assignment plans in Cleveland. (Tr. 321-322). Mrs. Madi-

son discouraged them from raising general claims of segregation in the Cleveland public schools with the State Board, and advised them that State Board members had little power or influence and therefore that there was little likelihood of help from the State. (Tr. 398-399). Mr. Pierce and Mrs. Gaines also were advised about the form which their prepared statements should take. (Tr. 399). This advice was followed even though both parents wished to say more about the problems of racial segregation and discrimination in Cleveland.

(Tr. 321, 402).

On April 13, 1970, the day of their presentation to the State Board of Education, Mr. Pierce and Mrs. Gaines met with Assistant Superintendent of Urban Education Greer. (Tr. 318, 427). During this meeting, Mr. Greer instructed both of them as to what they were permitted to say to the State Board. Mr. Pierce, for example, testified that he indicated to Mr. Greer that he wished to discuss "violence and segregation in the Cleveland Public Schools, especially at Collinwood." (Tr. 321); the number of black employees in the system; the racial treatment of students; and desegregation of the system in general. (Tr. 323-324). He was advised by Assistant Superintendent Greer that he "could only ask questions", "could not name names or places," and "could not discuss specific cases of isolated segregation." (Tr. 321-324). Rather, his remarks were to be "general" (*Id.*) and all "harsher" words had to be deleted. (Tr. 356). Mrs. Gaines, on the advice of Mr. Greer, actually deleted references to overcrowding and segregation at Glenville High School and the absence of multicultural curriculum and materials at Collinwood High School. (Tr. 423-440; Plaintiffs' Exhibit 61).

During their five-minute presentations to the Board, the two parents were still able to raise serious questions about the problems of racial segregation in the Cleveland

public schools and the inability or unwillingness of the Cleveland Board of Education to respond to these concerns. (Plaintiffs' Exhibit 46). Consistent with the suggestions of Mrs. Madison, both parents structured their presentations to follow the Board's 1968 Policy Statement on Equal Education Opportunity. (*Id.*). During the public session, no board member asked any questions or requested specific details about the problems of the Cleveland public schools. (Tr. 332, 409).

After presentation to the State Board, Mr. Pierce and Mrs. Gaines met with Assistant Superintendent Greer, Board Member Mildred Madison, a representative of the Department of Justice, and others. (Plaintiffs' Exhibit 49). Mr. Greer was asked to come to Cleveland to provide assistance to local school officials, and responded that such a trip required an invitation from the local officials. (Tr. 400-401).

Subsequent to the April 13, 1970 State Board meeting, Assistant Superintendent Greer prepared a memorandum to Superintendent Essex containing follow-up replies to the questions asked by Mr. Pierce and Mrs. Gaines. A copy of this memorandum was sent to Mr. Pierce and Mrs. Gaines, as well as to Cleveland Superintendent Paul Briggs. (Plaintiffs' Exhibit 49; Tr. 333-339, 409-410).

Both Mr. Pierce and Mrs. Gaines felt that their presentation to the State Board constituted a "complaint" (Tr. 325, 330). They were seeking help from the State Board to ease the racial tensions that had so recently erupted in violence in the schools. They were after assistance, not information about what the State Board had done in the past. (Tr. 330, 353). However, they were never told of any technical or procedural requirements needed to raise their presentation to a "complaint," as opposed to a "concern" or a "request for information" (Tr. 325, 326). The response they received—the Greer-Essex memorandum—was regarded as an unsatisfactory response to their request for state help to solve the racial problems. (Tr. 340-341, 409-410).

Significantly, the Greer-Essex memorandum reveals that the State Department of Education had "been kept informed of the situation at Collinwood." (Plaintiffs' Exhibit 49, p.l.). The state defendants clearly were aware of the racial nature of the problem. Combined with the presentation made by Mr. Pierce and Mrs. Gaines, there is no doubt that the State defendants had knowledge of the existence of arguably segregative practices in Glenville and Collinwood High Schools.

The Greer-Essex memorandum also is significant in that it states with reference to the Collinwood situation: "Legal authority for the Department to function in a capacity other than advisory does not exist." (*Id.*) Such a statement was a clear misstatement of the legal authority under which the State Board and Department of Education operated. *See* Attorney General's Opinion, July 9, 1956; O.R.C. § 3301.07. It was effective, however, in convincing Mr. Pierce and Mrs. Gaines that the State's role in eliminating segregative practices was minimal and that their continued efforts to secure assistance from the State defendants would be fruitless. (Tr. 432-435).

The conduct of the State defendants in dealing with the matters presented by Mr. Pierce and Mrs. Gaines merely reflects a deliberate policy of following procedures designed to insure that important information regarding desegregation is never available. While the State defendants refuse to investigate unless a formal complaint is filed, the requirements for the filing of such a complaint are never communicated to the public. And even if a "complaint" is attempted to be filed, the Superintendent has unbridled discretion to apply the label of "concern" or "request for information", neither of which trigger an investigation. In any event, the State defendants limit those who might otherwise press complaints by claiming that they can act solely in an advisory manner.

6) In 1968, the State Department of Education undertook a survey of each school and school district in the State. This survey was reported completely by June, 1970, and identified Cleveland as one of the ten most racially isolated school districts in the State of Ohio. (Plaintiffs' Exhibit 379 [Trial]).

7) In 1975, representatives for the State Department of Education participated in numerous meetings with representatives of HEW and the Cleveland Board of Education to discuss HEW's denial of Cleveland's application for Emergency School Assistance Act funding. (Plaintiffs' Exhibits 203; 204; 205; 206; 207 [Trial]). The application was denied because of the failure of the Cleveland defendants to incorporate an acceptable plan to reduce racial isolation in schools. (*Id.*) In the face of this extensive involvement by the State Department of Education and obvious awareness of the serious racial problems in Cleveland, the State defendants chose to deny that they had knowledge of any *de jure* segregation. The weight of the evidence clearly suggests otherwise.

The evidence reveals that the State defendants, or their employees, had knowledge of allegations of segregative acts in the Cleveland public schools, and information documenting the existence of such acts. In no instance did the State Board or Department determine to investigate such matters. Rather they chose to ignore information regarding the existence of such practices, opting instead for a policy of calculated ignorance, and therefore, inaction.

8) Members of the State Board of Education were made aware of the segregated nature of the Cleveland public schools in many and varied ways. Mr. Wayne E. Shaffer, who was a member of the State Board from its creation in 1956 to the present, testified that "we couldn't help but be aware that Cleveland had some very serious problems and

that they were connected with minority matters. We knew that. Dr. Briggs was before us many times. His predecessor and his predecessor's predecessor came before our board. We knew that there were acute problems in Cleveland . . . We knew that there were schools that were predominantly black. We know that there were other schools that were predominantly white." (T.Tr. 3585)

B. State Defendants' Failure To Protest Or Restrain Intentional Segregative Practices of the Cleveland Board of Education By Withholding Funds.

Despite substantial knowledge suggesting that intentional segregation of black pupils was occurring in the Cleveland public school district, the State defendants never undertook efforts to protest or restrain the Cleveland defendants by threatening or actually withholding state and federal educational funds. The reasons are deeply rooted in the State Board's traditionally limited conception of its statutory and constitutional obligations.

Since at least 1956, the State defendants have had both the legal authority and obligation to prevent the distribution of funds to school districts which have not "conformed with the law." O.R.C. 3317.14, Attorney General's Opinion, July 9, 1956 (Plaintiffs' Exhibit [Trial] 383). Any doubts about the nature and scope of the State Board's powers and duties were dispelled by the Attorney General's Opinion which had been solicited by the Board. The Board was advised that the term "law", as used in O.R.C. 3317.14, "embraces the equal protection provision in the Fourteenth Amendment of the Constitution of the United States under which segregation of pupils in schools according to race is forbidden." (*Id.*) Significantly, the Attorney General informed the State defendants that, "It is the responsibility of the state board of education in the first instance to determine whether a particular school district, or the board of education of such district, 'has not conformed with the

law' so as to require the withholding of state funds from such district." (*Id.*).

Presumably to fulfill the obligations specified by law and reinforced by the Attorney General's Opinion, the State Board adopted certain policies and procedures to determine whether school districts had not "conformed with the law." First, it assumed that all districts were operating lawfully, an assumption not warranted by the history of school segregation in the State of Ohio. *See* pp. 12-14, *supra* [App. 66-69]. Secondly, the State Board adopted a complaint procedure which permitted the Board to ignore substantial information regarding segregative practices if the State Superintendent decided not to describe a presentation or request as a "complaint". *See* pp. 12-15, *supra* [App. 66-70]. By these two policies, the State defendants were able to insulate themselves from relevant information and structure their functions so as to preclude State investigations into alleged segregative practices.

In instances where no formal complaint was filed, the State defendants offered technical desegregation assistance to local school districts. This assistance included providing information regarding racial isolation to local school districts by means of monographs and mini-journals (Defendants' Exhibit 2003; 2004 [Trial], workshops (T.Tr. 3806-3809) and on-site visits (T.Tr. 3814). Of course, this desegregation assistance was voluntary. The State defendants have provided the Court with no reason to believe that local officials who had committed intentional segregative acts would either request such assistance or, if requested, actually employ it to achieve desegregation.

While the policies and procedures of the State Board and Department might have been satisfactory in an abstract, incipient system, they were clearly insufficient for a public education system mired with the remnants of an official state segregative practice and local practices inconsistent with officially-declared state policy. In any event,

the procedures were employed to justify the State Board's refusal to act in the face of growing evidence of nonconformity with the law in Cleveland.

The abdication of responsibility by the State defendants cannot be defended on the grounds of sound administrative practice. Pursuant to obligations imposed under federal and state law, the Board was required to ascertain a local district's conformity with law and cut off state funds if such conformity was not present. This the State Board failed to do.

C. The State Defendants' Continuance of Support to the Cleveland Public Schools in the Face of Knowledge of Intentional Segregative Practices.

A major portion of the State defendants' defense rests on the contention that neither the State Board nor the Department of Education had any knowledge of the Cleveland defendants' intentionally segregative practices. *See* Proposed Findings of Fact and Conclusions of Law of the State Board of Education and Superintendent of Public Instruction, pp. 2-4. And without this necessary knowledge, they had no basis to discontinue their financial and other assistance to the Cleveland public school district.

The State Board relies on a 1964 decision of this Court which, it is alleged, "absolved the Cleveland school system of the NAACP's charge of unlawful segregation." *Id.*, p.l. The Board cites *Craggett* v. *Cleveland Board of Education*, 234 F. Supp. 381 (N.D. Ohio 1964), *aff'd* 338 F.2d 941 (6th Cir. 1964). The Board argues that it was the holding of *Craggett* that whatever segregation existed at the time in the Cleveland Public School System was *de facto* and hence not violative of the pupils' Fourteenth Amendment rights. Therefore, the argument continues, the Board had no duty to investigate the Cleveland school system or to eliminate the segregation there. The Board's reliance on *Craggett* was, and is, misplaced. First, *Craggett* involved the

construction of three elementary schools in black neighborhoods which would, predictably, be attended predominantly by black students. The Court found that such construction was not intentionally discriminatory. The Court did not, and could not, find that the Cleveland Public School System as a whole was not illegally segregated. The case was decided on motion for preliminary injunction, and, as the Sixth Circuit noted in affirming the District Court, the case had not been heard on the merits, 338 F.2d at 942. Second, even were the Board's reading of the *Craggett* decision correct, the Board was not relieved of its affirmative obligation to ensure that school systems within the state be operated in accordance with the law. Several times after *Craggett*, the Board was apprised of racial inequities in the Cleveland school system. The Board cannot now claim that it ignored such information on the basis of an extremely narrow judicial opinion which had no bearing whatsoever on such segregative practices as intact busing, reduced school days, gerrymandering of school attendance zones, school closing, use of portable classrooms, and so forth. From the premise that the Cleveland Board was not guilty of segregative intent in building three neighborhood elementary schools, the conclusion that the Cleveland Public School System as a whole was not intentionally segregated was simply unwarranted, especially in light of the information which was constantly filtering through to the State Board.

As a factual matter, then, the contention of the State defendants is not supportable. Important information was made available to the State Board and Department of Education indicating the existence of intentional segregation in Cleveland. *See* pp. 20-27, [App. 75-84] *supra*. The defendants' claim that they did not "know" of such segregation appears to rest on the fact that they conducted no independent investigations and did not ascertain the accuracy of such information. Thus while they received in-

formation regarding segregative conduct from contacts with other government officials, collected data reports and protests and complaints of concerned parents, they did not "know" whether that conduct in fact existed.

The Court finds no support in law for the absolutist standard of "knowledge" relied upon by the State defendants. Upon being informed or advised of the existence of relevant facts, there can be no legal sanctuary for ignorance deliberately maintained.

D. The Motivation of the State Defendants in Failing to Investigate the Reasons for De Facto Segregation.

The State Board of Education and the Department of Education have been, and are, aware of the existence of many predominantly one race schools in large urban areas in the State of Ohio. (Tr. 600, 152). They were aware, as of 1970, that Cleveland was one of the ten school districts with the most racial isolation in the State of Ohio (Plaintiffs' Exhibit 379 [Trial]).

Despite knowledge of extensive *de facto* segregation in Ohio generally, and in Cleveland specifically, the State defendants did not undertake any investigation of the reasons for such segregation. Their justifications for this failure can be stated simply: *de facto* segregation is not violative of the Constitution (Tr. 601-602, 152-153), and no complaint was ever filed suggesting that illegal segregation existed in the Cleveland school district. (Tr. 277).

The Court rejects the defendants' contention that the absence of a formal complaint justifies the failure to conduct an investigation of segregation in Cleveland. The Pierce-Gaines presentation to the Board in 1970 clearly suggested the existence of illegal segregation in Cleveland and was intended to be a complaint. *See* pp. 23-26, *supra*. That this presentation was not considered a complaint is indicative of the use of discretionary procedural devices to shelter the Board from knowledge, and therefore an

obligation to act. In any case, other information made available to the State defendants suggested the existence of illegal segregation in Cleveland. *See* pp. 20-27, *supra.*

The State defendants' claim that *de facto* segregation was not investigated because it was considered lawful does not address the question of motivation. *De facto* segregation always has been, and continues to be, lawful. *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189, 208 (1973). Intentional racial segregation—*de jure* segregation—has been unlawful at least since the decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954).

The real question involves the State defendants' assumption that all segregation is considered *de facto,* unless proven otherwise. This assumption is merely a restatement of the assumption that all systems are operating lawfully in the area of race and is similarly unwarranted. Given the history of state mandated and permitted segregation, and the state defendants' knowledge that separate schools had been maintained unlawfully long after they were officially abolished, any assumption of legality is not supportable by history. Nor is this assumption supported by the fact that "neighborhood" schools have long been considered legal. *See Craggett* v. *Cleveland Board of Education,* 234 F. Supp. 381 (N.D. Ohio), aff'd, 358 F. 2d 941 (6th Cir. 1964); *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 417-418 (1977) (Dayton I). Without focusing on intent, the "neighborhood" label becomes a readily available means to segregate by race. *See Reed* v. *Rhodes, supra,* 422 U.S. at 790-92.

The failure of the State defendants to investigate *de facto* segregation ultimately appears to have been motivated by a desire to maintain the status quo. Instead of responding to duties imposed by state law and the federal constitution, the State Board and Department of Education chose to abdicate their responsibilities to insure equal protection of the laws.

E. The 'Incremental Segregative Effect' of the State Board's Action and Inaction.

Had the State Board acknowledged its affirmative obligation under state and federal law to discover and eliminate local segregation, and had it exercised its power to withhold state monies from local segregated school systems or to dissolve and consolidate school districts, the likelihood is that the Cleveland Public School System would not have been in the sorry, segregated condition that this Court found it in 1976. While the notion of 'incremental segregative effect' is not a mathematically precise one, this Court concludes that, had the State intervened at the appropriate time, the intentional segregation rampant within the Cleveland school system could have been eliminated 'root and branch' many years ago. The State Board's continued torpidity in the face of clear evidence of *de jure* segregation of the Cleveland schools had the 'incremental segregative effect' of allowing continued segregation where it need not have continued.

The State Board's failure to take affirmative steps to eliminate or alleviate unconstitutional racial segregation in the Cleveland public school district, by itself, apparently does not support a finding of state liability under the Fourteenth Amendment. *Reed* v. *Rhodes*, *supra*, 607 F.2d at 714; *Penick* v. *Columbus Board of Education*, *supra*, 583 F.2d at 818. This is true even though the State of Ohio operating through the State Board of Education, is legally and primarily responsible for the maintenance and operation of public schools in Ohio, Ohio Const., Art. VI § 3; Drury's Ohio School Guide, § 301, p. 25 (3d ed.), and the responsibility in the area of racial segregation has been clearly set forth and communicated to the Board. Attorney General's Opinion. Thus, the mere fact that the Board has "notice of its obligation to seek out, locate, and extirpate racial segregation in the public schools of Ohio", *Reed* v. *Rhodes*, *supra*, 422 F. Supp. at 794, and knowingly fails to meet its obligation, is insufficient to impose

liability on the State. *Arthur* v. *Nyquist*, 573 F.2d 134, 146-47 (2d Cir. 1978); *cf. Rizzo* v. *Goode*, 423 U.S. 362, 375-77 (1976).

The failure of the State Board to take actions intended to eliminate segregation can, when combined with other facts, support a finding of constitutional violation, for "the Constitution can be violated by inaction as well as deeds." *Geier* v. *University of Tennessee*, 597 F.2d 1056, 1067 (6th Cir. 1979), *cert. denied*, __ U.S. __, 100 S. Ct. 180 (1979). *See Columbus Board of Education* v. *Penick*, *supra*, 433 U.S. at 449-50. Thus, a state which initially compelled or authorized the creation of a local dual system of education has a continuing affirmative duty to eradicate all lingering effects of segregation; the neglect of that constitutional duty renders the State liable *Geier*, *supra*, 597 F.2d at 1067; *United States* v. *Missouri*, 363 F. Supp. 739, 747 (E.D. Mo. 1973), *aff'd in relevant part*, 515 F.2d 1365 (8th Cir.) (*en banc*) *cert. denied*, 423 U.S. 951 (1975). The Fourteenth Amendment requires "state officials . . . to take the necessary steps 'to eliminate from the public schools all vestiges of state imposed segregation'" *Milliken* v. *Bradley*, 433 U.S. 267, 289-90 (1977) (citation omitted). Even if a State took no part in the creation of a local dual system of public education, it can be liable with local officials if it or its agents adhered to a deliberate policy of tolerating or supporting intentional racial segregation. *Norwood* v. *Harrison*, 413 U.S. 455, 463-67 (1973); *Reed* v. *Rhodes*, *supra*, 607 F.2d at 717-18. The rationale is set forth by the Supreme Court in *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958):

> State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no state shall deny to any person within its jurisdiction the equal protection of the laws.

This Court cannot conclude that the State of Ohio operated a state-wide racially dual system of public school-

ing at the time of *Brown* v. *Board of Education, supra.* Certainly State law after 1887 did not mandate that separate schools be maintained for black children. *Board of Education* v. *The State,* 45 Ohio St. 555 (1888). However, the mere repeal of the "Black laws" did not alter the fundamental policies and customs of significant numbers of local school boards and state officials. Local school boards continued to operate separate schools, and state officials showed no tendency to enforce the law despite knowledge of the existence of numerous separate schools for blacks throughout the State. Considering the historical background, the failure to demand compliance suggests a deliberate policy of refusing to enforce state law on behalf of a racial minority—a fundamental violation of the Fourteenth Amendment's guarantee of "equal protection of the laws".

A finding of state liability need not depend on the finding that the State of Ohio operated a state-wide dual system of education. Rather, knowledge by the state of intentional segregative practices by the local board and intentional support of the local board in pursuing such practices are sufficient to establish a constitutional violation. *Reed* v. *Rhodes, supra,* 607 F.2d at 717-18.

The evidence considered by this Court in the original liability trial and first remand opinion, combined with the testimony and exhibits produced during the most recent remand hearings, indicates that the State defendants had knowledge of serious racial problems in the Cleveland area. The State Board and Department also had knowledge of intentional segregative practices being pursued by the Cleveland Board of Education. This knowledge was derived from protests to the State Board by concerned parents, from data on the racial composition of faculty and students in school, and from reports from, and discussions with, federal officials.

The assertion that ignorance of the *de jure* nature of segregation in Cleveland constitutes a valid defense

cannot withstand careful scrutiny. The State Board cannot escape liability by seeking to erect the shelter of ignorance. "No State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be." *Burton* v. *Wilmington Parking Authority*, 365 U.S 715, 725 (1961). Time and again the State Board and Department of Education were exposed to information pointing specifically to the existence of *de jure* segregation in Cleveland. Yet time and again the State defendants deliberately chose not to pursue an investigation which might reveal additional facts which would constitute first hand knowledge and perhaps force them to make difficult desegregative decisions. In this regard, "it is difficult not to metaphorically refer to the State Board of Education as the proverbial ostrich with its head in the sand. Despite being virtually buried in an avalanche of data pointing up the severely segregated nature of the Cleveland schools, the Board steadfastly adhered to its do-nothing policy." *Reed* v. *Rhodes, supra*, 422 F.Supp. at 796.

Numerous factors indicate that despite substantial information regarding intentional segregative practices in Cleveland, the State Board of Education intentionally supported the Cleveland Board of Education in the pursuit of such practices.[2] The historical background is one of

---

[2] *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), indicates that the following factors are relevant to determining intent

(i) The impact of the official action;

(ii) The historical background of the decision;

(iii) The specific sequence of events leading to the particular decision, and particularly, any departures from normal policy and practice;

(iv) The legislative or administrative history, particularly "contemporary statements by members of the decision-making body".

initial state-mandated segregation. Subsequently, local practice and state inaction permitted separate schools to continue in existence. Against this historical background and, in the face of information demonstrating the existence of *de jure* segregation, the Board failed to conduct any investigation to determine the cause of segregation in Cleveland or to ascertain the validity of complaints and reports of intentional segregation. This failure to investigate occurred even though the State defendants had been advised of their primary responsibility, "in the first instance," to insure conformity with law. The impact of the State Board's decision to decline to investigate was to permit acts of *de jure* segregation to continue. This inaction also permitted millions of dollars in state and federal funds to be utilized by the Cleveland defendants to operate their unconstitutional school system. The policies and practices of the State Board in structuring and enforcing their obligations concerning segregation were markedly different from policies pursued in other fields. Vigorous exercise of powers and duties in other educational areas distinguished the Board's general activities in establishing and enforcing minimum educational standards from the Board's inaction in racial matters.

The findings of intentional support and knowledge of segregative practices in the Cleveland public school district undergird this Court's conclusion that the State defendants are jointly liable for the creation and maintenance of illegally segregated public schools in the City of Cleveland.

Therefore, the State defendants are, along with the Cleveland defendants, responsible for implementing a remedy which will eliminate all vestiges of unconstitutional segregation in the Cleveland public school district.

At the very least, therefore, the State defendants must, except where statutes, legislation, or normal practice provide for a greater reimbursement, share jointly and

severally in the cost of implementation of desegregation on a continuing basis, and must reimburse the local defendants for the State's share of desegregation-related expenses incurred so far. Future costs shall be shared by the State defendants as they are incurred, and not on a reimbursement basis, in order that the local defendants not be further unduly burdened with the total cost of implementation. However, as this Court noted in its Remedial Order of February 6, 1978, 455 F. Supp. 569, 607, the State's responsibility goes beyond giving financial aid. The Court reiterates that Order here:

> The federal constitution requires that the State take an active part in dismantling the dual school system it has helped to create and replacing it with a unitary, integrated system. The Ohio constitution and state statutes make the State Board primarily responsible for educating students in a racially integrated manner.
>
> To insure State participation in the remedy process the Court orders the State Board to undertake a "positive action program" of the type described in the Special Master's Recommendations at 151, October 27, 1977:
>
> The Special Master recommends that the Court gain assurances from the State defendants that a positive action program will be instituted to inspect and insure that all schools in the Cleveland District meet and maintain State Minimum Standards. Such a program should include reviewing test results and further devising and utilizing methods of ascertaining and assuring that students in the Cleveland School System are achieving in accordance with the grade level to which they have advanced in the Cleveland School System. The program should also include more positive investigation and more rigorous enforcement in regard to schools meeting and maintaining State Minimum Standards in regard to the physical and safety aspects of the educational environment. The program should further include more rigorous enforcement of State educational standards in regard to pro-

visions of equal educational opportunities to minority students in a desegregated atmosphere in the Cleveland School System.

In addition, the State defendants are expected to continue to provide their expertise as necessary to aid the City defendants in carrying out the other aspects of this Order and such supplementary orders as will issue from time to time.

Should further remedial orders prove necessary, they will be forthcoming.

IT IS SO ORDERED.

FRANK J. BATTISTI
Chief Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

ROBERT A. REED, et al., *Plaintiffs,* vs. JAMES A. RHODES, et al., *Defendants*	C73-1300 JUDGMENT ENTRY

Battisti, C.J.

In accordance with the Memorandum Opinion and Order filed on September 23, 1980,

IT IS ORDERED, ADJUDGED AND DECREED that the State defendants are jointly liable for the creation and maintenance of illegally segregated public schools in the City of Cleveland.

FRANK J. BATTISTI

Frank J. Battisti, *Chief Judge*

No. 80-3700

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT A. REED III, et al.,
Plaintiffs-Appellees,

vs.

JAMES A. RHODES, et al.,
Defendants,

and

OHIO STATE BOARD OF EDUCATION AND OHIO SUPERINTENDENT OF PUBLIC INSTRUCTION,
Defendants-Appellants.

APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed October 21, 1981.

Before: EDWARDS, Chief Judge, LIVELY and ENGEL, Circuit Judges.

EDWARDS, Chief Judge. This is the Cleveland desegregation case which has been returned to this court after our remand to the District Court for new findings of fact concerning the question of intentional segregation on the part of the defendants-appellants, Ohio State Board of Education and Ohio Superintendent of Public Instruction. *Reed* v. *Rhodes,* 607 F.2d 714 (6th Cir. 1979), *cert. denied,* 445 U.S. 935 (1980); *Reed* v. *Rhodes* on remand, 500 F.Supp. 404 (N.D. Ohio 1980). The District Judge on remand entered eight findings of fact which he viewed as establishing that the State Board and its Superintendent had knowledge of serious and intentional discrimination

against black children in the Cleveland School system and continued to support that school system including its segregative practices through state financing in spite of that knowledge and in spite of a state law duty to withhold such financing. He held that this record represents intentional segregation within the meaning of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979). We affirm.

This court's remand spelled out our understanding of intentional segregation as the Supreme Court has employed that concept in these cases (and others).

> While in some respects the findings of segregative purpose on the part of the state serve to meet the Dayton requirements, [*Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 97 S.Ct. 2766, 53 L.Ed.2d 85 (1977)], Dayton appears to us to negate a state liability finding entered principally on the ground of failure of the state to compel its subdivision to comply with the United States Constitution. As we have indicated in the Columbus opinion, [*Penick* v. *Columbus Board of Education*, 583 F.2d 787 (6th Cir. 1978), *aff'd* 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979)], knowledge by the state of intentional segregative practices on the part of the local board and intentional support of the local board in pursuing such practices appear to be requirements for a finding of constitutional violation. For these reasons, the question of state board liability is again remanded to the District Court for answers to the questions posed in *Penick* v. *Columbus Board of Education*.

607 F.2d at 718.

In the *Penick* opinion, we remanded for the District Judge to make findings on the following:

> 1) The State Board's knowledge (if any) of the Columbus Board's intentional segregative practices, 2) the State Board's failure to protest or restrain them

by withholding funds, 3) the State Board's continuance of support in the face of such knowledge, 4) the motivation of the State Board in failing to investigate the reasons for de facto segregation, and 5) the effect of findings if any, under 1, 2, 3 and 4 above, as suggested in [*Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420, 97 S.Ct. 2766, 53 L.Ed.2d 85 (1977)].

583 F.2d at 818.

The District Judge's answers and detailed findings of fact concerning defendants' knowledge of and participation in intentional segregation in Cleveland are as follows:

A. State Defendants' Knowledge of Intentional Segregative Practices in the Cleveland Public School District.

* * *

The Court finds that the State defendants either (1) had knowledge of the existence of substantial intentional segregative practices by the Cleveland defendants, or (2) were confronted with information of such magnitude that such knowledge could be imputed to them; and that their failure to investigate and to correct the violations was intentionally supportive of such practices.

This finding is based on the following:

1) As early as 1930, the State defendants were aware that the Cleveland Board of Education was operating special schools for significant numbers of black children. (Plaintiffs' Exhibit 21). These separate schools were being maintained long after the General Assembly and Supreme Court of Ohio had declared separate schools to be abolished.

2) In the late 1950's the State defendants granted a waiver to the Cleveland Board of Education from compliance with minimum hour-per-day standards. This permitted the Cleveland defendants to provide less than the required daily hours of education to students in over-crowded schools, the great majority of whom were black. This Court has previously found

this action to be an intentional segregative act on the part of both the State and Cleveland defendants. 422 F.Supp. 708, 793; 455 F.Supp. 546, 565 (remand opinion).

The state defendants repeatedly have contended that they never were advised of the number or identity of the schools, or the race of the pupils involved. However, evidence now indicates that the State defendants did request the "names of schools and grade levels" to be affected (Plaintiffs' Exhibit 28) and no evidence suggests that this evidence was not produced. Moreover, at all times the State Department of Education had access to relevant data regarding the schools to which waivers were granted.

3) In 1967, a report on "Racial Isolation in the Cleveland Public Schools" was prepared by Dr. Willard Richan of Case Western Reserve for the United States Commission of Civil Rights. (Plaintiffs' Exhibit 224 [Trial]). This report detailed certain intentionally segregative acts performed by the Cleveland Board of Education. (Tr. 225). Unbelievably, the State defendants claim they were never aware of such a study until the original liability trial in 1976. (Tr. 223-224). However, evidence indicates that this study was mentioned in a public presentation to the State Board of Education on racial problems in the Cleveland public schools in April 1970. (Plaintiffs' Exhibit 46). Specifically, the question was posed to the State Board: "Do you make use, for example, of U. S. Civil Rights Commission findings on policies of the Cleveland School System?" (*Id.* at 2). The fact that no copy was requested and no questions were asked regarding the findings cannot shelter the state defendants from knowledge of the existence of the report. This represents another example of highly relevant information concerning segregation made available but not pursued by the state defendants.

4) In 1970, racial tension in the Collinwood area of Cleveland in Collinwood High School reached a point where the Cleveland Police were no longer able to control the violence and the National Guard

had to be alerted and stationed in the area. (Tr. 311-314, 442; Plaintiffs' Exhibit 47; 48). The adamant refusal of the Cleveland Board of Education to reassign black students from overcrowded, all-black Glenville High School to adjacent, underutilized and predominantly white Collinwood High School contributed to this tension. (Tr. 3945-3960 Plaintiffs' Exhibit 60).

The racial problems confronting the Collinwood and Glenville High Schools in Cleveland prompted concerned parents to seek assistance from the federal government. On April 10, 1970, a letter was sent to civil rights specialist Leonard Hamilton of the Department of Health, Education and Welfare by the Glenville Task Force on Education and the Collinwood Committee of Black Concern. (Plaintiffs' Exhibit 55). That letter requested the withholding of federal funds from the Cleveland Board of Education because of various segregative practices, including: discriminatory gerrymandering of the Collinwood High School district; discriminatory transfers of black students out of Collinwood High School; disproportionate black faculty; and overcrowding of all-black Glenville High School resulting in inferior facilities and education. (*Id.*). It stated that members of the community would "be pleased to present evidence to support our claims of discriminatory practices in the Cleveland schools." (*Id.*)

A copy of this letter calling "for an investigation of discriminatory practices in the Cleveland School System" was sent by Mrs. Gaines to Robert Greer, Assistant Superintendent of Urban Education, on April 27, 1970. (Plaintiffs' Exhibit 56). Despite receipt of this letter detailing specific claims of segregative practices, the State defendants undertook no investigative or corrective actions. The State Superintendent was "not really sure of what happened with HEW" (Tr. 570) and claims that he was not informed of the contents of the HEW letter (Tr. 572).

Fortunately, the Department of Health, Education and Welfare did undertake to investigate the complaint of the Collinwood and Glenville parent groups. Its investigation revealed that

> (1) Some education services provided to students at Glenville are not equal to those provided at Collinwood, (2) pupil assignment and boundary practices have created an overcrowded school at Glenville and an underutilized school at Collinwood.

HEW's report concluded that "[t]he comparison between Glenville High School, 100 percent minority, and Collinwood High, 30 percent minority, indicates that an unequal situation exists between the two schools," in eight areas, including equipment, library facilities, vocational course offerings, counselling, special education, and faculty assignments.

(Plaintiffs' Exhibit 62).

The evidence presented with regard to the HEW letter and finding indicates that Assistant Superintendent Greer did have knowledge of substantial claims of segregation in the Cleveland public schools. However, consistent with a policy of calculated ignorance and inaction, no investigation was ever conducted.

5) Parental concern over the situation at Collinwood and Glenville High Schools did not end with a letter being sent to the Department of Health, Education and Welfare. Fortuitously, two concerned parents, Mr. Rufus Pierce and Mrs. Edith Gaines, were informed by Mildred Madison, a newly elected black member of the State Board of Education from Cleveland, that they could appear before the State Board of Education. (Tr. 315-317, 398). Mr. Pierce and Mrs. Gaines told Mrs. Madison that they wished to complain about deliberately segregative student and faculty assignment plans in Cleveland. (Tr. 321-322). Mrs. Madison discouraged them from raising general claims of segregation in the Cleveland public schools with the State Board, and advised them that State Board members had little power or influence and therefore that there was little likelihood of help from the State. (Tr. 398-399). Mr. Pierce and Mrs. Gaines also were advised about the form which their prepared statements should take. (Tr. 399). This advice

was followed even though both parents wished to say more about the problems of racial segregation and discrimination in Cleveland.

(Tr. 321, 402).

On April 13, 1970, the day of their presentation to the State Board of Education, Mr. Pierce and Mrs. Gaines met with Assistant Superintendent of Urban Education Greer. (Tr. 318, 427). During this meeting, Mr. Greer instructed both of them as to what they were permitted to say to the State Board. Mr. Pierce, for example, testified that he indicated to Mr. Greer that he wished to discuss "violence and segregation in the Cleveland Public Schools, especially at Collinwood." (Tr. 321); the number of black employees in the system; the racial treatment of students; and desegregation of the system in general. (Tr. 323-324). He was advised by Assistant Superintendent Greer that he "could only ask questions", could not name names or places," and "could not discuss specific cases of isolated segregation." (Tr. 321-324). Rather, his remarks were to be "general" (*Id.*) and all "harsher" words had to be deleted. (Tr. 356). Mrs. Gaines, on the advice of Mr. Greer, actually deleted references to overcrowding and segregation at Glenville High School and the absence of multi-cultural curriculum and materials at Collinwood High School. (Tr. 423-440; Plaintiffs' Exhibit 61).

During their five-minute presentations to the Board, the two parents were still able to raise serious questions about the problems of racial segregation in the Cleveland public schools and the inability or unwillingness of the Cleveland Board of Education to respond to these concerns. (Plaintiffs' Exhibit 46). Consistent with the suggestions of Mrs. Madison, both parents structured their presentations to follow the Board's 1968 Policy Statement on Equal Education Opportunity. (*Id.*). During the public session, no board member asked any questions or requested specific details about the problems of the Cleveland public schools. (Tr. 332, 409).

After presentation to the State Board, Mr. Pierce and Mrs. Gaines met with Assistant Superintendent

Greer, Board Member Mildred Madison, a representative of the Department of Justice, and others. (Plaintiffs' Exhibit 49). Mr. Greer was asked to come to Cleveland to provide assistance to local school officials, and responded that such a trip required an invitation from the local officials. (Tr. 400-401).

Subsequent to the April 13, 1970 State Board meeting, Assistant Superintendent Greer prepared a memorandum to Superintendent Essex containing follow-up replies to the questions asked by Mr. Pierce and Mrs. Gaines. A copy of this memorandum was sent to Mr. Pierce and Mrs. Gaines, as well as to Cleveland Superintendent Paul Briggs. (Plaintiff's Exhibit 49; Tr. 333-339, 409-410).

Both Mr. Pierce and Mrs. Gaines felt that their presentation to the State Board constituted a "complaint" (Tr. 325, 330). They were seeking help from the State Board to ease the racial tensions that had so recently erupted in violence in the schools. They were after assistance, not information about what the State Board had done in the past. (Tr. 330, 353). However, they were never told of any technical or procedural requirements needed to raise their presentation to a "complaint," as opposed to a "concern" or a "request for information" (Tr. 325, 326). The response they received – the Greer-Essex memorandum – was regarded as an unsatisfactory response to their request for state help to solve the racial problems. (Tr. 340-341, 409-410).

Significantly, the Greer-Essex memorandum reveals that the State Department of Education had "been kept informed of the situation at Collinwood." (Plaintiffs' Exhibit 49, p. 1). The state defendants clearly were aware of the racial nature of the problem. Combined with the presentation made by Mr. Pierce and Mrs. Gaines, there is no doubt that the State defendants had knowledge of the existence of arguably segregative practices in Glenville and Collinwood High Schools.

The Greer-Essex memorandum also is significant in that it states with reference to the Collinwood situation: "Legal authority for the Department to func-

tion in a capacity other than advisory does not exist." (*Id.*) Such a statement was a clear misstatement of the legal authority under which the State Board and Department of Education operated. *See* Attorney General's Opinion, July 9, 1956; O.R.C. § 3301.07. It was effective, however, in convincing Mr. Pierce and Mrs. Gaines that the State's role in eliminating segregative practices was minimal and that their continued efforts to secure assistance from the State defendants would be fruitless. (Tr. 432-435).

The conduct of the State defendants in dealing with the matters presented by Mr. Pierce and Mrs. Gaines merely reflects a deliberate policy of following procedures designed to insure that important information regarding desegregation is never available. While the State defendants refuse to investigate unless a formal complaint is filed, the requirements for the filing of such a complaint are never communicated to the public. And even if a "complaint" is attempted to be filed, the Superintendent has unbridled discretion to apply the label of "concern" or "request for information", neither of which trigger an investigation. In any event, the State defendants limit those who might otherwise press complaints by claiming that they can act solely in an advisory manner.

6) In 1968, the State Department of Education undertook a survey of each school and school district in the State. This survey was reported completely by June, 1970, and identified Cleveland as one of the ten most racially isolated school districts in the State of Ohio. (Plaintiffs' Exhibit 379 [Trial]).

7) In 1975, representatives for the State Department of Education participated in numerous meetings with representatives of HEW and the Cleveland Board of Education to discuss HEW's denial of Cleveland's application for Emergency School Assistance Act funding. (Plaintiffs' Exhibits 203; 204; 205; 206; 207 [Trial]). The application was denied because of the failure of the Cleveland defendants to incorporate an acceptable plan to reduce racial isolation in schools. (*Id.*) In the face of this extensive involvement by the

State Department of Education and obvious awareness of the serious racial problems in Cleveland, the State defendants chose to deny that they had knowledge of any *de jure* segregation. The weight of the evidence clearly suggests otherwise.

The evidence reveals that the State defendants, or their employees, had knowledge of allegations of segregative acts in the Cleveland public schools, and information documenting the existence of such acts. In no instance did the State Board or Department determine to investigate such matters. Rather they chose to ignore information regarding the existence of such practices, opting instead for a policy of calculated ignorance, and therefore, inaction.

8) Members of the State Board of Education were made aware of the segregated nature of the Cleveland public schools in many and varied ways. Mr. Wayne E. Shaffer, who was a member of the State Board from its creation in 1956 to the present, testified that "we couldn't help but be aware that Cleveland had some very serious problems and that they were connected with minority matters. We know that. Dr. Briggs was before us many times. His predecessor and his predecessor's predecessor came before our board. We know that there were acute problems in Cleveland . . . . We know that there were schools that were predominantly black. We know that there were other schools that were predominantly white." (T. Tr. 3585)

Reed v. *Rhodes*, 500 F.Supp. at 416-420.

We have examined these findings of fact against the lengthy record in this case. We cannot hold that any of them are "clearly erroneous." They appear to us to charge the state defendants with detailed knowledge of the Cleveland Board's segregative practices.

The District Judge made additional analyses of the defendants' knowledge of school segregation, their legal duty to correct same and their motivation in failing to do so.

D. The Motivation of the State Defendants in Failing to Investigate the Reasons for *De Facto* Segregation.

The State Board of Education and the Department of Education have been, and are, aware of the existence of many predominantly one race schools in large urban areas in the State of Ohio. (Tr. 600, 152). They were aware, as of 1970, that Cleveland was one of the ten school districts with the most racial isolation in the State of Ohio (Plaintiffs' Exhibit 379 [Trial]).

Despite knowledge of extensive *de facto* segregation in Ohio generally, and in Cleveland specifically, the State defendants did not undertake any investigation of the reasons for such segregation.

* * *

The Court rejects the defendants' contention that the absence of a formal complaint justifies the failure to conduct an investigation of segregation in Cleveland. The Pierce-Gaines presentation to the Board in 1970 clearly suggested the existence of illegal segregation in Cleveland and was intended to be a complaint. *See* pp. 418-420, *supra*. That this presentation was not considered a complaint is indicative of the use of discretionary procedural devices to shelter the Board from knowledge, and therefore an obligation to act. In any case, other information made available to the State defendants suggested the existence of illegal segregation in Cleveland.

* * *

The failure of the State defendants to investigate *de facto* segregation ultimately appears to have been motivated by a desire to maintain the status quo. Instead of responding to duties imposed by state law and the federal constitution, the State Board and Department of Education chose to abdicate their responsibilities to insure equal protection of the laws.

* * *

E. The "Incremental Segregative Effect" of the State Board's Action and Inaction.

> Had the State Board acknowledged its affirmative obligation under state and federal law to discover and eliminate local segregation, and had it exercised its power to withhold state monies from local segregated school systems or to dissolve and consolidate school districts, the likelihood is that the Cleveland Public School System would not have been in the sorry, segregated condition that this Court found it in 1976. While the notion of "incremental segregative effect" is not a mathematically precise one, this Court concludes that, had the State intervened at the appropriate time, the intentional segregation rampant within the Cleveland system could have been eliminated "root and branch" many years ago. The State Board's continued torpidity in the face of clear evidence of *de jure* segregation of the Cleveland schools had the "incremental segregative effect" of allowing continued segregation where it need not have continued.
>
> ° ° °
>
> The findings of intentional support and knowledge of segregative practices in the Cleveland public school district undergird this Court's conclusion that the State defendants are jointly liable for the creation and maintenance of illegally segregated public schools in the City of Cleveland.
>
> Therefore, the State defendants are, along with the Cleveland defendants, responsible for implementing a remedy which will eliminate all vestiges of unconstitutional segregation in the Cleveland public school district.

500 F.Supp. at 422, 423, 425.

The state defendants responded to the District Judge's conclusions with two main arguments. First, they deny prior knowledge of the segregative practices found by the District Judge, mainly because no complaints were filed before them. Second, they assert that they had no duty to inform themselves and provide a remedy, until and unless there was court adjudication of the illegality of the questionable segregative practice or incident.

For six years (from 1956 to 1961) the state board and the state superintendent waived minimum classroom instruction limits by granting express exemptions to Cleveland school officials, enabling these to institute split sessions which provided children with only three and a half hours of schooling instead of the required five hours. It is a fact that the overwhelming majority of the schools in Cleveland which thus provided less than the minimum school time were virtually all black. Although the state defendants denied knowledge of the number, identity and racial composition of these schools, it is now evident that, in addition to having access to this data at all times, they requested this specific information about the schools to which waivers were granted.

There is also evidence on the record that the state defendants were made aware of the underlying causes of racial tensions in overcrowded black schools; there is evidence that the existence of the Richan report which catalogued certain racially segregative actions of the Cleveland school officials was made known to the state Board of Education.

For these and other reasons[1] in this record, we find the state defendants' argument that they lacked knowledge of unconstitutional segregation to be a disingenuous contention.

---

[1]Plaintiffs argued that official reports required for many years by the defendant state board predecessors from every school district concerning the existence of "separate schools for colored children" were so indicative of knowledge of intentional segregative conduct on the part of the state board that such reports should weigh heavily in the Cleveland case, although the Cleveland Board consistently answered "None" on the report forms. The record here is such as to require affirmance of the District Judge with or without reliance on these reports. *But see Penick* v. *Columbus Board of Education,* ——— F.2d ——— (6th Cir. 1981). (Nos. 81-3072, 3102, slip opinion ——— 1981).

We turn now to the second argument advanced by the state defendants, namely, that absent a legal finding by a court, they had no duty to take action to end segregation in Ohio schools.

In early 1956, Mr. Charles Lucas, the only black member of the State Board of Education, moved that the Board withhold state funds from any school district that practiced racial discrimination. The motion was defeated. He then suggested that an opinion on the matter be sought from the Attorney General of Ohio. This motion was also defeated.

In May of 1956, Mr. Lucas proposed the following motion:

> WHEREAS: The Supreme Court of the United States has clearly defined racial segregation in the public schools as unconstitutional, and
>
> WHEREAS: The Supreme Court of the State of Ohio has ruled racial segregation in the public schools unconstitutional, and
>
> WHEREAS: Remnants of racially segregated schools exist in Ohio, and
>
> WHEREAS: The Ohio State Board of Education is specifically authorized in House Bill #212 to administer the schools within the framework of existing law, and to regulate the admissions of pupils and to set up the highest possible educational standards for the public schools of Ohio,
>
> BE IT RESOLVED: that the Ohio State Board of Education go on record as insisting that each public school under its jurisdiction operate within State and Federal laws requiring equality of treatment of all pupils, regardless of race, creed, or color under penalty of loss of state funds.
>
> BE IT FURTHER RESOLVED: that the Ohio State Board of Education, on and after September, 1956 will instruct the State Controlling Board to withhold funds from any school district which operates a racially

segregated school in defiance of the public policy of the State of Ohio, the Ohio Supreme Court and the Supreme Court of the United States.

This motion was also defeated but Lucas' insistence did finally secure a request from the Board to the Attorney General concerning the Board's authority to take action concerning racial discrimination in Ohio's schools. The answer written by Attorney General C. William O'Neill (later to be Chief Justice of Ohio's Supreme Court) was unequivocal:[2]

> 1. The term "law" as used in Section 3317.14, Revised Code, forbidding the distribution of state funds to school districts which have not "conformed with the law," is used in the abstract sense and embraces the aggregate of all those rules and principles enforced and sanctioned by the governing power in the community. Such term embraces the equal protection provision in the Fourteenth Amendment of the Constitution of the United States under which the segregation of pupils in schools according to race is forbidden.
>
> 2. The primary responsibility for administering the laws relating to the distribution of state and federal funds to the several public school districts is placed with the state board of education, subject to the approval of the state controlling board.
>
> 3. It is the responsibility of the state board of education in the first instance to determine whether a particular school district, or the board of education of such district, "has not conformed with the law" so as to require the withholding of state funds from such district. In making such determination the state board of education should observe the requirements of the Administrative Procedure Act, Chapter 119., Revised Code, as to notice, hearing, summoning of witnesses,

---

[2]The full text of the Attorney General's Opinion is attached as Appendix.

presentation of evidence, degree of proof, and procedural matters generally.

4. Following a determination by the state board of education that a school district "has not conformed with the law" so as to require the withholding of state funds as provided in Section 3317.14, Revised Code, such board and the controlling board, acting separately, may, for "good and sufficient reason" established to the satisfaction of each board, order a distribution of funds to such district notwithstanding such lack of conformity with the law.

The Attorney General's opinion also specified the State Board's obligations in the area of racial segregation:

> It follows, therefore, that in those cases in which your board finds as a matter of fact that racial segregation exists in a particular school district the restrictive provisions of Section 3317.14, Revised Code, must be deemed to apply.

1956 Op. Atty. Gen. Ohio 514, 520-521, 518.

We do not know how more specifically the defendants could have been instructed on their duty, under both state and federal law, to require the schools they were helping to finance, to desegregate any schools which had been intentionally segregated and to withhold state financing from systems which refused. This record shows that in the history of Ohio, defendants never fulfilled that duty.

We now turn to the list of findings which were sought in our remand of this case.

As shown above in this record and as found by the District Court:

1. The State Board had direct knowledge of the Cleveland Board's intentional school segregative practices.

2. Under the laws of Ohio, the defendant State Board of Education and its Superintendent had "the primary responsibility" for determining whether its

school districts (including the Cleveland Board of Education) "has conformed with the laws."

3. The State Board never, in relation to Cleveland, discharged its legal "responsibility . . . to determine whether a particular school district or the board of education of such district 'has not conformed to the law' so as to require the withholding of state funds from such district."

4. To the contrary the record shows that the State Board continued to support the Cleveland Board's activities including (among others) financing racially segregated teaching staffs, segregated schools and discrimination in sharply reduced educational programs in black schools as compared to white schools.

5. The motivation (and the effect) of the State Board on this total record must be held to be the perpetuation of racial segregation.

6. The incremental effect of the State Board's actions and inaction is the total failure of compliance with the constitutions and laws of the United States and of Ohio in the performance of the duty to eliminate racial segregation in the Cleveland School system.

The judgment of the District Court is affirmed.

Appendix

APPENDIX

Columbus, Ohio, July 9, 1956

Mr. R. M. Eyman, Executive Secretary,
State Board of Education
State Office Building, Columbus, Ohio

Dear Sir:

I have for consideration your request for my opinion in which the following questions are presented:

> "1) Does the term 'the law and the rules and regulations pursuant thereto' in said Section of the Revised Code (Section 3317.14) refer to all the statutes, decisions and constitutional provisions relating to schools, or to the Foundation Law only, or otherwise?
>
> "2) By what procedure may the state board of education and the state controlling board determine whether a local board of education 'has conformed with the law'?
>
> "3) In determining whether good and sufficient reason for non-conformance has been established, to [SIC] the state board of education and the state controlling board act separately or as a unit?
>
> "4) In making such determination, what, if any, investigative and hearing powers does the state board of education have; what rules of evidence must be followed; and what degree of proof is required?"

As to your first question, a provision is found in existing Section 3317.14, Revised Code, for the withholding of state funds in the case of certain school districts as follows:

> "A school district, the board of education of *which has not conformed with the law* and the rules and regulations pursuant thereto, shall not participate in the distribution of funds authorized by sections 3317.02, 3317.04, and 3317.12 of the Revised Code, except for good and sufficient reason established to

> the satisfaction of the superintendent of public instruction and the state controlling board. ° ° °"
>
> (Emphasis added.)

Effective October 1, 1956, an amended provision, analogous to that above, will become effective as follows:

> "A school district, the board of education of which *has not conformed with the law* and the rules and regulations pursuant thereto, shall not participate in the distribution of funds authorized by section 3317.02 of the Revised Code, except for good and sufficient reason established to the satisfaction of the state board of education and the state controlling board. ° ° °" (Emphasis added.)

The use of the article "the" in this statute is suggestive, but only faintly so, of the idea that reference is made to a particular legislative enactment. However, it will be seen that there is not the slightest suggestion in the context of this provision which would aid in identifying any such particular enactment.

Moreover, it is to be observed that the article "the" was inserted in the statute in the course of the 1953 codification, the prior analogous provision in Section 4848-6, General Code, reading as follows:

> "A school district, the board of education of which has not conformed with *all the requirements of law* and the rules and regulations pursuant thereto, shall not participate in the distribution of funds authorized by the provisions of sections 4848-1, 4848-3 and 4848-9 of the General Code, except for good and sufficient reason established to the satisfaction of the superintendent of public instruction and the state controlling board; ° ° °" (Emphasis added.)

It thus becomes clear, because of the legislative purpose, clearly expressed in Section 1.24, Revised Code, not to affect substantive changes in the recodification process,

that the provision here in question, to the extent that the point is pertinent, must be read as though the article "the" had not been inserted as an incident of such recodification.

In Cyclopedic Law Dictionary, Third Edition, on the definition of the term "law" it is said:

> "A distinction is to be observed in the outset between the abstract and the concrete meaning of the word. In the broadest sense which it bears when used in the abstract law, it is the science which treats of the theory of government.
>
> "In a stricter sense, but still in the abstract, it is the aggregate of those rules and principles enforced and sanctioned by the governing power in a community, and according to which it regulates, limits, and protects the conduct of members of the community. In the abstract sense, it includes the decisions of the courts."

In the same work the use of a prefixed article is mentioned as follows:

> "Used without an article prefixed, the abstract sense is generally intended; with an article, the sense is usually concrete."

Applying this rule to the case at hand, and giving consideration to the circumstance that the context in which the term is used in Section 3317.14, Revised Code, gives no hint as to the identity of a particular statute to which reference might be intended, it becomes necessary to conclude that the term "law" as used in that section is used in the abstract meaning of the word.

Because the provision in question relates to the "requirements of law," or conformity therewith, it is clear the term is not here used in such a broad abstract sense as to include the "science which treats of the theory of government," but rather that it is used in the somewhat stricter sense which embraces "the aggregate of those rules

and principles enforced and sanctioned by the governing power in a community" and that it "includes the decisions of courts."

Although not set out in your inquiry in express terms, there is latent therein the question of whether the conformity with law provision in Section 3317.14, Revised Code, is sufficient in scope to include instances of segregation of pupils in school according to race.

In the 14th Amendment of the Constitution of the United States there is this provision:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In Article VI of the Constitution of the United States there is this provision:

> "* * * This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. * * *"

It is quite clear that these provisions are such as to be comprehended in the term "law" in the sense in which I have indicated such term is used in Section 3317.14, supra, and where there is a denial of "equal protection of the laws" there is an instance of not having "conformed with the requirements of law" or of not having "conformed with the law" as provided in that section.

The equal protection clause above quoted was the subject of consideration in Brown v. Board of Education,

347 U. S., 483, 98 L. Ed. 873, the headnotes in the latter report of the decision being in part as follows:

> "5. The equal protection clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools, even though the physical facilities and other tangible factors, such as curricula and qualifications and salaries of teachers, may be equal."

In the opinion of the court, delivered by Mr. Chief Justice Warren, there is the following statement:

> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

This decision is the unanimous pronouncement of the highest court in the land and must be regarded as dispositive of the question of the illegality of racial segregation in the public schools of this state.

It follows, therefore, that in these cases in which your board finds as a matter of fact that racial segregation exists in a particular school district the restrictive provisions of Section 3317.14, Revised Code, must be deemed to apply.

As to the question of your board and the controlling board acting jointly or separately, it is first to be observed that the action of the two boards, in approving distribution of funds notwithstanding a failure to conform with the law, is called for only *after* it is determined that a particular district or board "has not conformed with the law."

Because the state board of education is given the authority and responsibility in Section 3301.07, Revised Code, to "administer and supervise the allocation and dis-

tribution of all state and federal funds," and because, in Section 3317.01, Revised Code, it is provided that "Sections 3317.01 to 3317.15, inclusive, of the Revised Code, *shall be administered by the state board of education,* with the approval of the controlling board," I conclude that the responsibility to ascertain whether in particular cases there is a lack of conformity with law is placed in the first instance with the state board of education.

In this connection, although the controlling board's approval is required in the administration of Sections 3317.01 to 3317.15, Revised Code, it is to be noted that that board's principal function is one in the field of fiscal management and accountability, whereas it is the duty of the state board of education to "administer" the laws relating generally to the operation of the schools, is provided with a departmental staff for the purpose, and is provided with extensive investigative powers as hereinafter pointed out.

Accordingly, until such an initial determination is made, the question of joint or separate action, under Section 3317.14, Revised Code, to distribute funds notwithstanding such failure, is purely academic.

I may observe in passing, however, that I perceive no language in the statute which in any way suggests joint action of such boards, and the fact that each is a separate entity, separately created by law, would clearly indicate the necessity of separate action.

As to the procedure by which your board may reach a determination as to a failure to conform to the law in particular cases, your attention is invited to the following provision in Section 3301.13, Revised Code:

> "* * * In the exercise of any of its functions or powers, including the power to make rules and regulations and to prescribe minimum standards, the department of education and any officer or agency therein, shall be subject to the provisions of chapter 119. of the Revised Code. * * *"

Because one of the functions or powers of the state board of education is to ascertain whether a failure to conform to law has occurred, it is clear that in such a proceeding the provisions of Chapter 119., Revised Code, will apply. Set out in that chapter are detailed procedures for holding hearings, summoning witnesses, receiving evidence, making adjudication orders, and for appeals from such orders by any person "adversely affected."

As to the rules of evidence to be followed and the degree of proof required, your attention is invited to the following provision in Section 119.12, Revised Code:

> "The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by *reliable, probative, and substantial evidence* and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by *reliable, probative, and substantial evidence* and is in accordance with law."
>
> (Emphasis added.)

Accordingly, in specific answer to your inquiry, it is my opinion that:

1. The term "law" as used in Section 3317.14, Revised Code, forbidding the distribution of state funds to school districts which have not "conformed with the law," is used in the abstract sense and embraces the aggregate of all those rules and principles enforced and sanctioned by the governing power in the community. Such term embraces the equal protection provision in the Fourteenth Amendment of the Constitution of the United States under which the segregation of pupils in schools according to race is forbidden.

2. The primary responsibility for administering the laws relating to the distribution of state and federal funds to the several public school districts is placed with the state board of education, subject to the approval of the state controlling board.

3. It is the responsibility of the state board of education in the first instance to determine whether a particular school district, or the board of education of such district, "has not conformed with the law" so as to require the withholding of state funds from such district. In making such determination the state board of education should observe the requirements of the Administrative Procedure Act, Chapter 119., Revised Code, as to notice, hearing, summoning of witnesses, presentation of evidence, degree of proof, and procedural matters generally.

4. Following a determination by the state board of education that a school district "has not conformed with the law" so as to require the withholding of state funds as provided in Section 3317.14, Revised Code, such board and the controlling board, acting separately, may, for "good and sufficient reason" established to the satisfaction of each board, order a distribution of funds to such district notwithstanding such lack of conformity with the law.

Respectfully,

C. WILLIAM O'NEILL
Attorney General

FILED
OCT. 21, 1981
JOHN P. HEHMAN, Clerk

No. 80-3700

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT ANTHONY REED, III, *et al.*,
Plaintiffs-Appellees,

vs.

JAMES RHODES, *et al.*,
Defendants,
and

OHIO STATE BOARD OF EDUCATION AND OHIO SUPERINTENDENT OF PUBLIC INSTRUCTION,
Defendants-Appellants.

APPEAL from the United States District Court for the Northern District of Ohio.

Before: EDWARDS, Chief Judge, LIVELY and ENGEL, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiffs - Appellees recover from Defendants - Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

Entered By Order Of The Court

_____

Clerk

A True Copy.

Attest:

_____

Deputy Clerk

Issued as Mandate:

COSTS:

Filing fee ..... $

Printing ..... $

Total ..... $

REED, Rehearing, Plaintiffs' Exhibit SL-46

Statement of Rufus Pierce to State Board of Education

April 13, 1970

I am Rufus Pierce of Cleveland, Ohio. I am a parent of two children attending Cleveland public schools — Collinwood and Longfellow. I also have four children who have graduated from Collinwood High School. As a long time resident of Cleveland and a product of the Cleveland schools myself, I am interested in school problems both as a parent and a citizen. I have been fortunate enough to obtain the Policy Statement on Equal Educational Opportunities from this Board and I have a few questions to ask about it.

My first question is: Have you been to Cleveland on the Collinwood High situation? If not, why not? What does the State Board intend to do?

The first recommendation of the Board is: 'Specific effort on the part of all school districts to find ways to move toward the solution of the problems of de facto segregation.' — What has the State School Board done to assist school districts in solving these problems? Particularly, what have you done to assist the Cleveland schools, and schools in the Collinwood area?

The second recommendation of the Board is: 'A periodic ethnic count of pupils and employees by the schools of the State as a realistic basis for program planning.' — What has the State Board done in this area? How is the count reported to you, and what are you doing about the count?

The third recommendation of the Board reads: 'A reexamination of personnel practices to make certain that no barrier, real or implied, precludes equal employment opportunities in the schools for all regardless of race, creed or national origin.' — Have you made a check on the hiring

policies and personnel practices of the Cleveland school system, and especially of Collinwood High School?

The fourth recommendation is: 'Explicit recognition in the instructional program of the contributions made by all racial and cultural groups to our Nation's growth and development.' — Are you aware that many students are not being educated as to the contributions of different cultural groups because courses, such as Black History, are electives?

The fifth recommendation reads: 'Inclusion in both pre-service and inservice teacher education of academic study, especially history, anthropology and sociology, which helps to develop understanding and a sensitivity to the problems of interpersonal and intergroup relations?'

The sixth recommendation is: 'Continued cooperation with the U.S. Office of Education, U.S. Dept. of Health, Education and Welfare; the Ohio Civil Rights Commission, and other official bodies to assist local school districts in defining problem areas and moving affirmatively to bring about integrated quality education.' — In my estimation, Collinwood is the only integrated quality education offered in Cleveland, and it seems to be failing due to the hostile atmosphere. What reports have you had on this?

In closing, I would like to ask if the state funds can be pro-rated on the more accurate basis of average daily attendance rather than average daily membership.

Statement of Edith Gaines to State Board of Education

April 13, 1970

I am Mrs. Hugh Gaines, parent of three sons attending Cleveland Public Schools — Collinwood and Glenville High Schools and Margaret Spellacy Junior High. My interest in school problems stems from my experiences as a parent and my work in the field of early childhood education. As

a citizen, I feel the responsibility of striving to heal the deep divisions in our society. I welcome the statement of this Board of Education that 'segregation deprives all segments of society, both the minority and the majority, of the vital life experiences without which they are culturally disadvantaged. Any form of segregation which divides children by color, creed or national origin deprives them of a full view of, and participation in, our society.'

I would like to ask this Board what you are doing to implement the extensive changes needed in textbooks and other instructional materials so that the fourth recommendation in the Board's Policy Statement on Equal Educational Opportunities can be realized in the public schools of our state. That recommendation reads, 'Explicit recognition in the instructional program of the contributions made by all racial and cultural groups to our Nation's growth and development.' Are changes in curriculum and materials being made so that contributions of all racial and cultural groups are taught as an integral part of American history and World History courses at the high school level?

The enriched instructional program described above can be taught only by teachers with adequate preparation. What are you doing as a State Board to guarantee that college education departments give adequate preservice preparation? How do you survey the curriculum offered in teacher education? Do you offer assistance to local school systems in the development of their in-service training in the area of multi-cultural contributions? Racial tensions, such as currently exist in Collinwood schools require of teachers a great deal of skill in inter-group relations. Do you offer assistance to local school systems in equipping teachers for this challenging task?

I would like to ask next about the State Board's policies and activities with relation to personnel practices and equal employment opportunities in local school districts. Do you survey hiring practices throughout the state? Do

you make use, for example, of U.S. Civil Rights Commission findings on policies of the Cleveland school system? What do you do if a local school system is not offering equal employment opportunities? Are you aware that there have never been a single Negro employee in the Cleveland School Board's Housing Department — that sensitive department which draws the district boundaries? Are you aware that Collinwood and Margaret Spellacy Schools in Cleveland have only a token number of black teachers, although the enrollment of black children is said to be between 25 and 30%?

Another aspect of personnel practices in which I am interested in is the wages, job security, and career ladder possibilities for teacher assistants. Dr. Martin Essex has provided excellent leadership in the development of the idea of teaching teams which utilize teacher assistants. Are you aware that teacher assistants in the Cleveland school system still receive as little as $1.60 an hour and have no guarantees of job security? Do not such personnel practices constitute a barrier to equal employment opportunities? What can this Board do to assist in the solution of such a problem?

Finally, I would like to request that Dr. Essex come to Cleveland as soon as possible to give us the benefit of his expertise in solving the many problems which face us.

Opposition

Office - Supreme Court, U.S.
FILED
FEB 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1330

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE OHIO STATE BOARD OF EDUCATION and
SUPERINTENDENT OF PUBLIC INSTRUCTION,

Petitioners,

vs.

ROBERT ANTHONY REED, III, *et al.*,
and
GARY L. PENICK, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

*THOMAS I. ATKINS
General Counsel
TERESA DEMCHAK
Asst. General Counsel
NAACP SPECIAL CONTRIBUTION FUND
1790 Broadway—Tenth Floor
New York, New York 10019
(212) 245-2100

RICHARD M. STEIN
536 South High Street
Columbus, Ohio 43215

Attorneys for Penick, et al.

*THOMAS I. ATKINS
General Counsel
TERESA DEMCHAK
Asst. General Counsel
NAACP SPECIAL CONTRIBUTION FUND
1790 Broadway—Tenth Floor
New York, New York 10019
(212) 245-2100

JAMES L. HARDIMAN
3488 Lee Road
Shaker Heights, Ohio 44120

Attorneys for Reed, et al.

* Lead Counsel

(Additional Counsel on Inside Cover)

Question Presented

Did the lower courts err in inquiring whether the petitioners, acted with segregative intent in failing to investigate and correct practices of local school officials in Columbus and Cleveland which practices petitioners knew or should have known were intentionally segregative?

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Authorities	iii
Introduction	1
Statement of the Case	2
The Decisions of the District Courts	3
The Decisions of the Court of Appeals	6
Reasons for Denying the Writ	8
1. These Cases Do Not Represent a Misapplication of Any Legal Standard by the Courts Below	8
2. These Cases Present No Recurring or Unresolved Legal Issues	9
Conclusion	10
Certificate of Service	12

Table of Authorities

Cases: PAGE

Amer. Const. Co. v. *Jacksonville T. & K.W.R. Co.*, 148 U.S. 372 (1893) 7

Brown v. *Board of Education*, 347 U.S. 483 (1954) 4

Columbus Board of Education v. *Penick*, 443 U.S. 449 (1979) 3, 4, 5, 9

Comstock v. *Group of Institutional Investors*, 335 U.S. 211 (1948) 7

Dayton Board of Education v. *Brinkman (Dayton I)*, 433 U.S. 406 (1977) 2, 2n, 3, 4, 6, 9

Dayton Board of Education v. *Brinkman (Dayton II)*, 443 U.S. 526 (1979) 3, 5, 9

Evans v. *Buchanan*, 393 F.Supp. 428 (D.Del. 1975), *aff'd*, 423 U.S. 963 (1975) 10

Keyes v. *School Dist. No. 1*, 413 U.S. 189 (1973) 3, 5, 9

Grover Manufacturing Co. v. *Linde*, 336 U.S. 271 (1949) 7

Liddell v. *Board of Education of City of St. Louis*, 491 F.Supp. 351 (E. D. Mo. 1980), aff'd, Nos. 80-1458, 80-1494, 80-1531, 80-1599 and 80-1735 (8th Cir. Feb. 13, 1981), *reh. denied*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 and 80-11735 (8th Cir. March 19, 1981), *cert. denied*, —— U.S. ——, 50 U.S.L.W. 3442 (Dec. 1, 1981) 10

Milliken v. *Bradley (Milliken I)*, 418 U.S. 717 (1974) ..3, 6, 7

Milliken v. *Bradley (Milliken II)*, 433 U.S. 267 (1977) 3, 9, 10

Penick v. *Columbus Board of Education*, 663 F.2d 24 (6th Cir. 1981) 1, 2

PAGE

Penick v. *Columbus Board of Education*, 583 F.2d 787 (6th Cir. 1978) 2n

Reed v. *Rhodes*, 500 F.Supp. 404 (N.D. Ohio 1980)..... 3n

Reed v. *Rhodes*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, 445 U.S. 935 (1980) 2n

Reed v. *Rhodes*, 662 F.2d 1219 (6th Cir. 1981) .....*passim*

United States v. *Board of School Commissioners*, 637 F.2d 1101 (7th Cir. 1980) 10

United States v. *Johnston*, 268 U.S. 220 (1925) 7

Village of Arlington Heights v. *MHDC*, 429 U.S. 252 (1977) 3, 5

Washington v. *Davis*, 426 U.S. 229 (1976) 3, 5

No. 81-1330

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE OHIO STATE BOARD OF EDUCATION and
SUPERINTENDENT OF PUBLIC INSTRUCTION,

Petitioners,

VS.

ROBERT ANTHONY REED, III, *et al.*,
and
GARY L. PENICK, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Introduction

Petitioners, the Ohio State Board of Education and Superintendent of Public Instruction, seek a Writ of Certiorari from this Court to review the judgments and opinions of the United States Court of Appeals for the Sixth Circuit entered on October 21, 1981, in two separate cases: *Reed* v. *Rhodes,* 662 F.2d 1219 (6th Cir. 1981), No. 80-3700; and *Penick* v. *Columbus Board of Education,* 663 F.2d 24 (6th Cir. 1981), Nos. 81-3072/3102.

Respondents, Robert Anthony Reed, III, et al., and Gary L. Penick, et al., respectfully urge this Court to deny the Petition.

Statement of the Case

The consolidated petition involves school desegregation cases in two Ohio cities, Cleveland (i.e., *Reed*) and Columbus (i.e., *Penick*). In each case systemwide constitutional violations by the local school officials have been found and affirmed on appeal.[1] Appropriate remedies have been developed and approved and are being implemented.

Petitioners argue that the findings made by the district courts, and affirmed by the court of appeals were based upon an erroneous understanding of the controlling legal principles on segregative intent. (Pet. 11).

The question of the petitioners' joint liability for intentional segregative conduct affecting these two city school districts, has been, however, the subject of review by each district court and the court of appeals on at least two occasions.[2]

In reviewing the initial decisions and judgments of the lower courts, the court of appeals, pursuant to this Court's decision in *Dayton Board of Education* v. *Brinkman, (Dayton I)*, 433 U.S. 409 (1977), remanded for further proceed-

---

[1] *Reed* v. *Rhodes*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, 445 U.S. 935 (1980); *Penick* v. *Columbus Board of Education*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979).

[2] In *Reed*, the court of appeals originally remanded the case to district court for further findings in light of this Court's decision in *Dayton Board of Education* v. *Brinkman, (Dayton I)*, 433 U.S. 409 (1977). Subsequently, the court of appeals remanded the question of the petitioners' liability in *Penick* for further findings on the issue of intent. *Penick* v. *Columbus Board of Education*, 583 F.2d 787 (6th Cir. 1978). Therein the court outlined certain guidelines on the question of the petitioners' liability. 583 F.2d at 817. When the petitioners again appealed the district court's judgment in *Reed*, the court of appeals followed the approach it had in *Penick* and remanded to the district court for further findings on the issue of the petitioners' segregative intent. *Reed* v. *Rhodes*, 607 F.2d 714, 718.

ings and findings the question of the petitioners' knowledge of intentional segregative practices on the part of the local boards and their intentional support of the local boards in pursuing such practices.

Following additional discovery and hearings, each district court entered detailed, supplementary findings and conclusions on the constitutional violations of the petitioners.[2]

The Decisions of the District Courts

In each instance, the district courts carefully and exhaustively reviewed the record evidence, including supplemental evidence introduced by respondents during the remand hearings, and correctly applied the controlling legal standards established by this Court in *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979); *Dayton Board of Education* v. *Brinkman (Dayton I), supra, and Dayton II*, 449 U.S. 526 (1979); *Milliken* v. *Bradley (Milliken I)*, 418 U.S. 717 (1974) and *Milliken II*, 433 U.S. 267 (1977); *Village of Arlington Heights* v. *MHDC*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229 (1976); and *Keyes* v. *School District, No. 1*, 413 U.S. 189 (1973). Each court expressly indicated that it clearly understood the issue to be determined. (Pet. A. 2; 56-57).

1. In assessing respondents' claims, the district courts in both *Reed* and *Penick*, consistent with *Arlington Heights*, *Columbus* and *Dayton II*, conducted sensitive inquiries into "historical facts concerning race and public education in Ohio." (Pet. A. 6-10; 55-61, 93). Based primarily on supplemental evidence introduced by respondents and consisting largely of historical state statutes, regulations and official records from petitioners' own files, the district courts

[2] *Reed* v. *Rhodes*, 500 F.Supp. 404 (N.D. Ohio 1980); *Penick* v. *Columbus Board of Education*, (Pet. A.).

found the existence of longstanding and pervasive racially segregative laws and traditions prominent in Ohio's past. (Pet. A. 7-8; 55-57). In the area of public education, each court further found that, notwithstanding the repeal, in 1887, of Ohio's "separate school law," numerous school districts continued thereafter to operate or establish "separate schools for colored children" and to report, on an annual basis until 1954, the existence of such schools to the petitioners, who in turn reported the information to the Governor. (Pet. A. 8-10; 57-61). Included among the school districts reported to have maintained such schools in the post-1887 era, were Columbus and Cleveland. (Pet. A. 9; 59-60). Only with this Court's landmark decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), did petitioners discontinue the collection of information on the number of these schools and the districts in which they were operated.[4] In 1956, the then newly-created State Board of Education, in response to pressure from its sole black member, solicited an opinion from the Ohio Attorney General as to its authority under this Court's decision in *Brown*. (Pet. A. 13-15; 64-66). In response thereto, the Attorney General advised petitioners that, under federal and state law, they had the primary responsibility and power to "investigate and determine whether local school districts were unlawfully segregated" and "an affirmative duty to act to eliminate unlawful segregation after becoming aware of its existence." (Pet. A. 13-15; 64-65). These significant findings, made by each district court, and affirmed by the court of appeals, are neither challenged or refuted by petitioners. (Pet. 6).

---

[4] It is now known, however, that school boards in two Ohio school districts, including Columbus, took no action, pursuant to *Brown*, to dismantle such schools, *Columbus Board of Education* v. *Penick*, *supra*, 443 U.S. 449; *Dayton Board of Education* v. *Brinkman*, *supra*, 443 U.S. 526. Instead, these districts continued to operate such schools through the post-*Brown* era, until being enjoined by court action.

2. Carefully reviewing the petitioners' post-*Brown* conduct in light of *Green, Keyes, Columbus* and *Dayton II*, the district courts each similarly found that "the [State] Board [of Education] developed policies and practices which effectively disabled it from acting at all in this area [i.e., public school segregation], thereby avoiding its obligation in the first instance to ferret out constitutional violations with the foreseeable result of maintaining and condoning constitutional violations by local boards." (Pet. A. 12, 15-21, 25-26, 30-32 *also see* Pet. A. 66, 71). In both *Penick* and *Reed*, the district courts found, for example, that despite knowledge of illegally segregative practices—including segregative teacher and administrator assignments; segregative school construction practices; gerrymandering of school attendance areas; and segregative student assignment and transfer policies on the part of the city school boards; as well as substantial data collected by petitioners revealing severe racial isolation of students within each district—petitioners failed to either require termination of the illegal practices or to investigate the conduct of the local districts for which they were responsible. (Pet. A. 17-18, 21-29; 76-89). Similarly, each court found that notwithstanding repeated complaints from parents and community representatives concerning segregative practices of the Columbus and Cleveland city boards and knowledge of the investigation of similar practices in each city by other governmental entities, petitioners consistently failed to undertake any affirmative action to investigate such complaints and/or to correct the violations. (Pet. A. 17-18, 22-25, 26-28; 69, 76-84).

3. In strict adherence to the intent requirements of *Keyes, Arlington Heights*, and *Washington* v. *Davis*, each district court conducted a sensitive inquiry into, as noted above, the prominent historical role of racial segregation in public education statewide, and in the two subject school

districts; as well as into substantive departures, based upon race, from the petitioners' general activities; the conduct of the petitioners in matters involving race in other Ohio school districts; contemporaneous notice to the petitioners about the discriminatory effects of specific actions and inactions of local school officials in the two subject districts; contemporaneous statements of petitioners evidencing segregative intent; specific actions taken by petitioners and having segregative impact within the subject school districts; contemporaneous knowledge of the petitioners of conduct having segregative impact on the part of the Cleveland and Columbus school officials. (Pet. A. 6-10, 11-32; 55-61, 62-88).

Based upon this examination, the district courts in both *Penick* and *Reed* found that the actions and failures of petitioners to act during the period subsequent to *Brown* through the time of the trial in each case, were motivated by "segregative intent." (Pet. A. 33, 88-89). Additionally, each court, recognizing clearly, this Court's holdings in *Swann, Milliken I,* and *Dayton I,* concerning causation, made specific findings on the impact of the petitioners' constitutional violations on the affected school districts and the appropriate remedial obligations to be assumed by the petitioners as measured by the scope of such violations. (Pet. A. 32-34; 90-86).

The Decisions of the Court of Appeals

In reviewing the opinions and judgments of the district courts, the court of appeals appropriately limited its inquiry, pursuant to Rule 52(a) F.R.Civ.P. and this Court's decision in *Dayton I,* to record evidence, the factual findings made and legal principles applied by the lower courts.

In each case, the appellate court considered the findings in light of the record and accepted them at "not clearly erroneous." (Pet. A. 44; 107). In both *Penick* and *Reed* the

court below found no basis to conclude that either district court had misapprehended or misapplied appropriate legal standards. (Pet. A. 48-50).

Additionally, on review of each opinion and judgment, the appellate court focused particularly on the lower courts' findings on petitioners' knowledge of intentional segregative practices of the Cleveland and Columbus boards, and their intentional support thereof; findings which it had considered insufficiently supported in the remanded district court opinions. In doing so, the court of appeals independently considered, and rejected as contrary to the record evidence, each of the arguments raised by the petitioners in response to these findings and conclusions. (Pet. A. 46-50; 109-113).

Based upon its thorough review of the factual evidence, findings and legal conclusions, the court of appeals, in both *Penick* and *Reed*, specifically affirmed, as not clearly erroneous and well supported by the record, findings that the petitioners had direct "knowledge" of "intentional school segregative practices" of the Columbus and Cleveland boards and were motivated by an intent to perpetuate "racial segregation" in failing to discharge their legal duty under the laws of Ohio to determine whether these two districts were operating in conformance with federal and state laws prohibiting racial segregation and in continuing to support the intentionally segregative practices of the Cleveland and Columbus boards. (Pet. A. 50; 113-114).[5]

[5] This Court's two-court rule thus supports acceptance of the factual determinations of the district courts concerning the nature and extent of the petitioners' intentionally segregative conduct and the scope of its impact in each of the local school districts. *Amer. Const. Co.* v. *Jacksonville T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893); *United States* v. *Johnston*, 268 U.S. 220, 222 (1925); *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214 (1948); *Grover Manufacturing Co.* v. *Linde*, 336 U.S. 271, 275 (1949); *Milliken* v. *Bradley, supra*, 418 U.S. at 738 n.18.

REASONS FOR DENYING THE WRIT

1. *These Cases Do Not Represent a Misapplication of Any Legal Standard by the Courts Below.*

The findings and conclusions of the district courts, as affirmed by the court of appeals, do not represent a departure from legal standards established by this Court in *Keyes.*[6] To the contrary, careful review of the district courts' and court of appeals' decisions demonstrate that, in each instance, those courts reached their ultimate conclusion as to the liability of the petitioners, based upon careful review of both the actions and defaults of the petitioners. Indeed, the detailed findings of the district courts, affirmed by the court of appeals, represent thorough exam-

---

[6] The petitioners' claim that the lower courts failed to find that they had an "intentionally segregative policy" such as that found in *Keyes,* ignores the distinction between the responsibilities of petitioners and local school authorities, such as those found liable in *Keyes.* In *Keyes,* the courts found that, with respect to a specific area of the Denver school district, the city school officials had engaged in a deliberate racially segregative policy evidenced by the gerrymandering of student attendance zones, the use of optional attendance zones and an excessive use of mobile classrooms. *Keyes, supra,* 413 U.S. at 192. Obviously, it was not required that the lower courts herein find that these petitioners had engaged in similar conduct. Nor could such a finding be made. Here, the petitioners are state educational authorities, who play no direct role in student assignment and/or facility utilization decisions of local school officials. In any event, the courts below made detailed and specific findings as to the nature of the petitioners' duties and obligations, including with respect to racial matters. And, the courts found that the petitioners failed to comply with these obligations, notwithstanding their knowledge of intentional segregative practices (similar to those found in *Keyes*), engaged in by school officials in Columbus and Cleveland. Further, the lower courts found that the petitioners, motivated by segregative intent, engaged in practices and adopted policies, albeit unwritten, designed for and in fact, resulting in the perpetuation of known illegal racial segregation in the two city school districts. (Pet. A. 28-34; 61-94). These factual findings and legal conclusions, affirmed by the court of appeals, meet the requisite intent standards required by *Keyes.*

inations of the extensive records including sensitive inquiries into the requisite issues of the petitioners' intent and motivation.

Petitioners' argument with particular factual findings of the courts below does not support a claim of error. The lower courts carefully applied controlling legal standards to the record evidence, properly concluding that petitioners' conduct, with respect to their knowledge and continued support of intentionally segregative practices of local school officials in Cleveland and Columbus, was designed to and did, in fact, result in the perpetuation of racial segregation in the public schools of each of these districts.

2. *These Cases Present No Recurring or Unresolved Legal Issues.*

While claiming that these cases leave unresolved issues of law as to the standards to be applied in determining the constitutional liability of state educational authorities, the petitioners concede that the decisions below do not conflict with decisions reached in other circuits in cases involving similar issues. (Pet. 14-16). The lower courts were cognizant of these other holdings. In reaching their ultimate conclusions, the lower courts carefully applied legal standards established by this Court in *Milliken I* and *Milliken II, Dayton I* and *Dayton II, Keyes* and *Columbus,* to the particular evidence in the records below.

Therefore, no legal issues meriting review by this Court are presented by these cases; the lower courts have determined that these petitioners, because of their past intentional support of and failure to eliminate intentional racially segregative practices they knew to exist must now assist in dismantling such segregation and its vestiges in the public schools of Cleveland and Columbus. This requirement is entirely consistent with this Court's hold-

ings and those of other circuits. *See, e.g., Milliken II, United States* v. *Board of School Commissioners,* 637 F.2d 1101 (7th Cir. 1980); *Evans* v. *Buchanan,* 393 F.Supp. 428 (D.Del. 1975), *aff'd,* 423 U.S. 963 (1975); *Liddell* v. *Board of Education of City of St. Louis,* 491 F.Supp. 351 (E. D. Mo. 1980), *aff'd,* Nos. 80-1458, 80-1494, 80-1531, 80-1599 and 80-1735 (8th Cir. Feb. 13, 1981), *reh. denied,* Nos. 80-1458, 80-1494, 80-1531, 80-1599 and 80-11735 (8th Cir. March 19, 1981), *cert. denied,* —— U.S. ——, 50 U.S.L.W. 3442 (Dec. 1, 1981).

CONCLUSION

For all the reasons discussed herein, the *Penick* and *Reed* respondents respectfully submit that the petition for certiorari be denied by this Court.

Respectfully submitted,

*Thomas I. Atkins
NAACP General Counsel
Teresa Demchak
NAACP
1790 Broadway
New York, New York 10019
(212) 245-2100

Richard M. Stein
536 South High Street
Columbus, Ohio 43215

William E. Caldwell
Elizabeth McKanna
Ratner & Sugarmon
525 Commerce Title Bldg.
Memphis, Tennessee 38103
(901) 525-8601

* Lead counsel.

SOLVITA MCMILLAN
1228 Williamson Bldg.
215 Euclid Avenue
Cleveland, Ohio 44114

LEO P. ROSS
180 E. Broad Street
Columbus, Ohio 43215

Counsel for Respondents, Penick, et al.

and

*THOMAS I. ATKINS
NAACP General Counsel
TERESA DEMCHAK
NAACP
1790 Broadway
New York, New York 10019
(212) 245-2100

JAMES L. HARDIMAN
3488 Lee Road
Shaker Heights, Ohio 44120

WILLIAM E. CALDWELL
ELIZABETH MCKANNA
RATNER & SUGARMON
525 Commerce Title Bldg.
Memphis, Tennessee 38103
(901) 525-8601

SOLVITA MCMILLAN
1228 Williamson Bldg.
215 Euclid Avenue
Cleveland, Ohio 44114

Counsel for Respondents, Reed, et al.

* Lead Counsel.

Certificate of Service

I hereby certify that three copies of the foregoing Brief in Opposition of Respondents, *Penick, et al.* and *Reed, et al.* were mailed, postage prepaid, this 16th day of February, 1982, to:

Mark O'Neill
2500 Terminal Tower
Cleveland, Ohio 44114
Counsel for Petitioners in Penick and Reed

Thomas Michael
1120 Huntington Bank Building
17 South High Street
Columbus, Ohio 43215
Counsel for Petitioners in Penick

Samuel Porter
37 East Broad Street
Suite 816
Columbus, Ohio 43215
Counsel for Respondent,
Columbus Board of Education, in Penick

William Baughman
1800 Union Commerce Building
Cleveland, Ohio 44115
Counsel for Respondent, Cleveland
Board of Education in Reed

Jeremiah Glassman
Civil Rights Division
General Litigation Section
U.S. Department of Justice
Washington, D.C. 20530
Counsel for Amicus Curiae
United States of America in Reed

.....

THOMAS I. ATKINS